Supreme Court, U.S.
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No. 95-631 (2)

In The

Supreme Court of the United States

October Term, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION.

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

vs.

HARVEY WEINER, WILLIAM J. HALL, THE MAYNARD SLESSINGER TRUST, PAULA P. FOLKMAN, GASPER SCLAFANI, MYERS L. GIRSCH AND DCA GRANTOR TRUST,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in a Rule 23(b)(3) class action, a representative of non-named class members who has failed to intervene pursuant to Rule 24 and who has failed to avail himself of collateral procedures to protect the interests of the non-named class members he represents, lacks standing to appeal the district court's order approving the settlement of the action.

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Respondents, Harvey Weiner, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsch and DCA Grantor Trust ("Class Plaintiffs"), submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner in this action seeks certiorari review of a per curiam dismissal of the Petitioner's appeal for lack of standing. Petitioner is the Administrator of the Investment Plus Plan (the "Plan"), the pension plan for former employees of Southeast Banking Corporation ("Southeast") and its affiliates.[1] Beneficiaries of the Plan, which made purchases of Southeast stock during the Class Period, are also members of the Class certified by the district court. It is undisputed that Petitioner was not a named party and, notwithstanding clear authority in the Eleventh Circuit requiring intervention under Rule 24, Fed.R.Civ.P. ("Rule 24") in order to perfect rights to appeal, Petitioner never moved to intervene as Administrator of the Plan in the district court.[2] As such, Petitioner has no standing to

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1. Petition for a Writ of Certiorari (hereinafter "Cert. Pet."), p. 3. Record references to pleadings and other court documents are indicated by "R[volume #]-[document #]-[page #]," and record references to transcripts are indicated by "R[volume #]-[page #]".

2. Petitioner attempted to intervene in the district court in his separate capacity as bankruptcy Trustee for the Chapter 7 estate of Southeast. He did so not to protect the interests of the Plan or the Class, but because he claimed the Stipulation of Settlement contained language that "might be construed by aggressive defense counsel to impair or impede the Trustee's ability to recover money damages on behalf of Southeast's bankruptcy estate." R11-225-1. Petitioner's Motion to Intervene as Bankruptcy Trustee was never granted by the district court. Even if it had been, the bankruptcy Trustee is not a member of the Class, does not represent any members of the Class and would have no standing to object to the settlement approved below.

prosecute this appeal. Petitioner now challenges the dismissal of his appeal by attacking the precedent he failed to follow.

Petitioner attempts to describe a split among the Circuits which, he asserts, is growing "both wider and more mature." Cert. Pet. p. 1. However, as discussed below, the conflict suggested by Petitioner is neither as real nor as significant as Petitioner suggests. Rather, there is a very definite trend among every Circuit which has addressed the issue directly to adopt the approach set forth by the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), which held that in order to preserve the right to appeal from a class action settlement, a non-named class member must formally intervene under Rule 24. As this Court has done three times since 1990, it should deny certiorari review on this issue.

This action arose as a consolidation of several shareholder class actions, the first of which was filed in March of 1990. The action concerned and preceded the collapse of Southeast Bank, a major economic institution in South Florida. The Class Plaintiffs' claims were brought pursuant to Section 10(b) of the Securities Exchange Act of 1934 on behalf of those persons who purchased the common stock and debentures of Southeast during the Class Period. On September 20, 1991, Southeast filed for protection under Chapter 7 of the United States Bankruptcy Code, after its primary subsidiary, Southeast Bank, N.A., was seized by government regulators and its assets were transferred to First Union Bank in a federally assisted bail-out. Class Plaintiffs subsequently moved, and were granted leave, to file a Fourth Consolidated Amended and Supplemental Complaint which asserted claims on behalf of those persons who purchased the common stock and debentures of Southeast during the period from February 27, 1989 through and including July 4, 1991.

This litigation was extremely hard fought for three and one-

half years, as evidenced by the more than 250 docket entries contained in the record index. On August 19, 1993, a Stipulation of Settlement was executed whereby the case was settled for $5,000,000 in cash, plus interest accrued thereon. Plaintiffs' Counsel (who had incurred over $975,500 in attorneys' time prior to the appeal) petitioned for an award of counsels' fees in the amount of $1,250,000, or 25% of the settlement fund, pursuant to controlling Eleventh Circuit law as set forth in *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). The settlement and the fee were approved over the objections of Petitioner, who was the only objector to any part of the settlement or fee request, notwithstanding the fact that more than 47,500 notices were mailed to Class members, as well as nominees and brokers.[3]

After extensive litigation in the district court, a settlement was reached. Competing claims had been filed by Petitioner (in his alternate role as Trustee) and others, including the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, that — together with mounting defense costs —

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3. The settlement and fee petition were supported by extensive memoranda as well as the sworn affidavits of Plaintiffs' Counsel, which included detailed time summaries, broken down by each attorney who worked on the case, as well as the types of activity performed. *See* R10-221-1, R11-235-1. Further, in Plaintiffs' Reply Memorandum in Support of Plaintiffs' Counsels' Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses, Class Plaintiffs specifically responded to Petitioner's objections, noted that he relied on inapplicable authority which did not concern common fund fee awards, questioned Petitioner's standing as well as his motives given his conflicting loyalties as both Trustee of the Chapter 7 estate of Southeast and Administrator of the Plan, and pointed out that his demand to inspect Counsel's underlying time records ran counter to the Eleventh Circuit's mandate in *Camden* that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. Resp. App. at 1a-26a. Citation to "Resp. App. at _____" refers to the appendix to this Brief in Opposition.

threatened to deplete the available directors' and officers' liability insurance which, upon the collapse of Southeast, offered the only meaningful source of recovery in this litigation as well as for the competing actions. In the face of the numerous competing claims, the seizure of Southeast Bank, the absence of any other real source of recovery for the Class, and in light of a damage analysis, based upon data evaluated by Plaintiffs' financial expert, of approximately $26 million (assuming Plaintiffs established the Defendants' liability), Plaintiffs' Counsel, after months of settlement negotiations, negotiated a $5 million cash settlement. Of that amount, and following more than three years of litigation for which they did not receive any payment, Plaintiffs' Counsel requested 25% of the settlement fund, the "benchmark" identified by the Eleventh Circuit in *Camden*, as attorney's fees.

The notice program included publication in the *Miami Herald* and *The Wall Street Journal* and the mailing of over 47,500 copies of the Class Notice.[4] This notice program elicited a

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4. Contrary to Petitioner's assertion, Rule 23(e) does not require that, in the settlement of Rule 23(b)(3) and 23.1 class and shareholder derivative actions, all absent class members be "summoned into court." Cert. Pet. p.11. Rather, Rule 23(e), which only applies to class actions, provides that, a class action shall not be dismissed or compromised without the approval of the court, and that notice of any proposed dismissal or compromise "shall be given to all members of the class in such manner as the court directs." In accordance with the provisions of Rule 23(c)(2) and (e) and the district court's Order pursuant thereto, Class members were given notice of the proposed settlement and the Settlement Hearing, as well as their right to seek exclusion (opt out) from the Class, and the *opportunity* to appear and be heard in support of or in opposition to the settlement. No one was "summoned into court." *See* Notice of Pendency of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear and Notice to Nominees, Resp. App. at 27a-30a, 34a-38a, 44a-47a.

total of one objection — that of the Petitioner — to any part of the settlement or fee request.[5]

At what the district court characterized as "11:59," R13-46, Petitioner's Counsel appeared at the November 15, 1993, Settlement Hearing on behalf of the Trustee of the estate of Southeast, R13-27, challenged the fee request, demanded to see Plaintiffs' Counsel's underlying time records and damage analysis and questioned the negotiation process. R13-40. At the Settlement Hearing, during which the district court heard extensive argument from Petitioner's Counsel, the district judge noted his personal familiarity with the case and the negotiation process which culminated in the settlement, his satisfaction with the record in so far as it supported the settlement and the fee petition, and stated that, in his opinion, this was a "very good settlement for all parties." R13-43-44, 50, 52, 54, 55. In an order dated November 23, 1993, the district court approved the settlement and Plaintiffs' Counsel's fee request.[6]

Petitioner objected at the Settlement Hearing and filed papers in opposition to the settlement, but never bothered to intervene under Rule 24. Upon the filing of their answer brief in the Eleventh Circuit, Class Plaintiffs pointed out, *inter alia,* that the Petitioner lacked standing to prosecute this appeal by reason

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5. Petitioner never objected to the Notice in the district court, nor did he assert any denial of due process until the filing of his Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Eleventh Circuit.

6. Petitioner's unwarranted claim that the district court "rubber stamped" the proposed settlement, Cert. Pet. p.3, is belied by the record below, particularly the district judge's statements at the Settlement Hearing as to his own familiarity with this action as well as the extensive briefing with respect to the settlement and Petitioner's objections thereto, and the lengthy Settlement Hearing at which Petitioner was given a full and fair opportunity to appear and be heard.

of his failure to formally intervene under Rule 24.[7] The Eleventh Circuit agreed and summarily dismissed the appeal based upon the clear precedent set forth in *Guthrie*. Pet. App. at 1a-2a.[8]

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO "COMPELLING REASONS" FOR THE GRANTING OF A WRIT OF CERTIORARI.

There are no "compelling reasons" for the granting of a Writ of Certiorari in this case as required by Rule 10 of the Rules of this Court. The principal argument advanced by Petitioner for the granting of a Writ of Certiorari is that a conflict exists among the Circuits as to the requirement to intervene under Rule 24 as a party to the litigation in order to have standing to appeal a final order in a class action brought pursuant to Rule 23(b)(3). There is hardly a conflict among the Circuits on this issue. Indeed, every Circuit that has squarely addressed this issue since 1987 has adopted the same holding as *Guthrie* in the context of a Rule 23 class action. There is no court that has specifically addressed the question presented here and decided the issue in a manner contrary to *Guthrie*. The decisions on which Petitioner relies to create some "conflict" on this procedural question are cases in which the issue was simply never addressed; discussed only in *dicta*; or decided in the context, not of a Rule 23(b)(3) class

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7. Since a single judge on a motion calendar is without authority to dismiss an appeal pursuant to Rule 27(c) Fed. R. App. P., the Appellee's Brief was the appropriate time to raise the fact that the Appellant had failed to follow the clearly articulated holding of prior Eleventh Circuit case law by not intervening pursuant to Rule 24.

8. Citation to "Pet. App. at ____" refers to the appendix to the Petition for a Writ of Certiorari.

action, but of a shareholder derivative action brought under Rule 23.1, where the shareholder has no claim independent of the corporation and is not given the opportunity to opt out, or Rule 23(b)(1) or (2) class actions where there is, similarly, no right to opt out.[9]

Neither Petitioner's mischaracterization of the factual background of the settlement, nor his untimely due process arguments provide grounds for certiorari review. This case was settled after extensive, hard-fought litigation, when the parties and the district judge were in a position to evaluate the merits of the case and the settlement. At the eleventh hour, Petitioner, who is also the Trustee of the bankruptcy estate of Southeast and who was spearheading a competing claim to that of the Class Plaintiffs, appeared and objected to the settlement for reasons known only by Petitioner. Proper notice of the settlement was afforded Petitioner, who was represented by counsel, yet failed to either intervene in the action or opt out of the Class, and is thus bound by the district court's final judgment. Petitioner's rhetoric does not change that fact, or in any way suggest a basis for further review.

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9. Petitioner attempts to draw a "determinative" distinction between Rule 23(b)(1) & (2) class actions on one hand, and Rule 23(b)(3) and 23.1 class and shareholder derivative actions on the other, based upon the fact that the latter cannot be settled without notice to absent class members and a hearing on their objections, if any, to the proposed settlement. Cert. Pet. p.3. This is not the relevant distinction in this case. Rather, a fundamental difference exists between Rule 23(b)(3) class actions and all other class categories *including* Rule 23.1 shareholder derivative actions, because the latter do not allow for class members to opt out of a settlement, thus eliminating one of the rationales underlying *Guthrie*. Apparently, Petitioner seeks to lump Rule 23(b)(3) and 23.1 actions together because Petitioner's argument that certain Circuits adhere to the theory that intervention is not required relies upon cases which involve Rule 23.1 derivative actions.

II.

THERE IS NO MAJOR CONFLICT AMONG THE CIRCUITS, AND THIS COURT HAS THREE TIMES REJECTED CERTIORARI PETITIONS ON CASES RAISING THE SAME ISSUES ADVANCED BY PETITIONER.

This Court has consistently denied certiorari in cases which presented the same standing issue on which Petitioner seeks certiorari review. *See Bramon v. Barnett Banks, Inc.*, 38 F.3d 572 (11th Cir. 1994), *cert. denied,* 15 S. Ct. 1824 (1995); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251 (1993); *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), *cert. denied,* 493 U.S. 1045 (1990). This suggests that the issues advanced by Petitioner are not "compelling" within the meaning of Supreme Court Rule 10 and that the conflict described by Petitioner is neither as real nor as significant as Petitioner suggests.

A. Subsequent to *Marino v. Ortiz*, the Circuit Courts are Unanimous in the View that Intervention Under Rule 24 is Required to Obtain Standing to Appeal a Final Order Approving a Class Action Settlement.

In *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court was faced with an appeal from a final hearing approving a consent decree in settlement of an action brought under Title VII of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The petitioners, while not absent class members, were officers who would be affected by the final judgment in the case and, thus, had a legally cognizable interest at stake. The petitioners had failed to intervene, but had presented their objections to the district court. This Court held that "since petitioners were not parties to the lawsuit, and because they failed

to intervene for purposes of appeal, they may not appeal the consent decree." 484 U.S. at 304. In doing so, this Court adhered to the rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.* (citations omitted.) This Court went on to note that, while the Court of Appeals had suggested there may exceptions to this rule, ". . . We think the better practice is for such a non-party to seek intervention." 484 U.S. at 305.

Petitioner's suggestion that this Court's holding in *Marino* has created "confusion" and has been "taken out of context" to support the principle that unnamed Rule 23(b)(3) class members must intervene in addition to objecting in order to have standing to appeal (Cert. Pet. p.16), has been rejected by the Courts of Appeals and this Court. In *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), the Eight Circuit, in holding that an unnamed class member could not appeal, even though it objected to the settlement agreement, because it had failed to intervene, stated, "We agree with *Guthrie* that *Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Id.* at 679. Upon application for certiorari review of the court's holding in *Croyden*, that *Marino* does support the theory that unnamed class members must intervene in addition to objecting in order to have standing to appeal, this Court denied certiorari review, suggesting that neither the *Croyden* Court nor the Court in *Guthrie* was "confused" in its interpretation of *Marino*.

Similarly, *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1060-61 (6th Cir. 1994), recognized that *Marino* "addressed the standing to appeal of non-parties and not . . . of non-representative members of a class or derivative suit." *Id.* However, based upon the reasoning set forth in *Marino*, the Sixth Circuit came to the logical conclusion that, "Similarly, merely the

interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them, even if they voluntarily make their interests known, through objections, to the district court. . . . *Marino* supports the notion that persons who are not proper parties should overcome some additional hurdle before attaining, for purposes of appeal, party status." *Id.*

In the year prior to this Court's holding in *Marino*, the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), held that in order to preserve the right to appeal from a class action settlement, a class member must formally intervene under Rule 24. Subsequent to this Court's holding in *Marino*, every Circuit Court that has addressed this issue has held that, absent intervention, a non-party class member has no standing to appeal. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988); as well as the court below in *In re Southeast Banking Corp. Securities Litigation*, 51 F.3d 1003 (11th Cir. 1985). In addition, the Seventh Circuit in *In the Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 368 (7th Cir. 1992), found "*Guthrie's* analysis persuasive where an unnamed class member . . . is appealing a post-settlement order implementing the settlement agreement." *Id.*[10]

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10. Petitioner's reliance upon *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), does not support certiorari review. *Rosenbaum* did not overturn *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993), wherein the Tenth Circuit, "joined circuits that require intervention by a class member in a Rule 23(b)(3) case in order to have standing to appeal the district court's approval of the settlement." *Rosenbaum*, 64 F.3d at 1440. Additionally, the rationale set

(Cont'd)

Contrary to Petitioner's assertion, the issue of whether an unnamed, but timely objecting member of a Rule 23(b)(3) class action may appeal the district court's approval of the settlement without intervention is not "unsettled." Post-*Guthrie* and *Marino*, there has been virtually no contrary view on this issue in the context of a class action settlement. In order to appeal a final judgment approving a class action settlement, one must take the relatively simply step of intervening under Rule 24 as a party plaintiff.

The rationale of *Guthrie* and subsequent cases is clear and well-reasoned. Rule 23 establishes a procedure whereby a class representative acts as a fiduciary on behalf of the class. Further, under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. An individual who has some interest in the outcome of litigation, but does not assume the fiduciary responsibilities of the class representative, and is not certified as such by the court, cannot act on behalf of the class. The notion of non-parties bringing appeals, often when they take interest in the litigation only at its conclusion, is contrary to the framework for representative litigation set forth in Rule 23. Just as merely having an interest in the outcome of litigation was held by this Court in *Marino* to be

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(Cont'd)
forth in *Rosenbaum* to justify a non-named class member's appeal of an attorneys' fee award does not withstand close scrutiny. For instance, the court theorized that, "should the dissident's appeal succeed in reducing attorneys' fees, there would be additional funds for later distribution to the class members." However, it did not take into consideration the potential enormous costs of such a redistribution in the context of a large shareholder action or how those costs would be paid. Further, the court's speculation that named plaintiffs could be biased in favor of their counsel and agree to what could be an excessive fee award, the excess portion of which would otherwise go to the class, ignores the fiduciary nature of the procedural framework of Rule 23 and, renders meaningless the district court's role in determining adequacy of representation. *Rosenbaum* does not provide support for Petitioner's position.

insufficient to confer standing, "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them." *Shults*, 35 F.3d at 1060.

Class members have adequate procedures under the Federal Rules of Civil Procedure to protect their substantive rights. As *Guthrie* and subsequent cases point out, class members may intervene under Rule 24 by filing a motion for intervention in the district court. The denial of such a motion is appealable. A second alternative is that a class member, if dissatisfied with the representation in the class action, may pursue a collateral proceeding. A third option is that a class member may simply opt out of the class under Rule 23(c)(2) and, thereby, not be bound by any final adjudication. *Guthrie*, 815 F.2d at 628. These are ample means of protecting the substantive rights of absent class members.[11]

If unnamed class members who have not intervened as

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11. Some of the authorities relied on by Petitioner are inapposite because they involve non-opt out classes. As the Sixth Circuit explained in *Gottlieb v. Wiles*, 11 F.3d at 110-11:

> [C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action . . . . In addition, there is no opt out provision in shareholder derivative suits. Thus, all shareholders are bound by the outcome regardless of their objections.

parties could initiate appellate proceedings without formally becoming parties, class actions would become unmanageable. "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogenous class . . . ." *Guthrie,* 815 F.2d at 629. When procedural protections afforded class members under Rules 23 and 24 are balanced against the specter of unwieldy litigation and the loss of manageability in class litigation, there is no question that the balance tips in favor of precluding appeals by those who have failed to take the simple step of intervention:

> If individual appeals without formal intervention were permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.

Gottlieb v. Wiles, 11 F.3d at 1009.

This Court squarely held in *Marino,* that the right to bring appellate review of an adverse judgment is limited to a party. The better practice is to adhere to that limitation in the class context, particularly in light of the procedures whereby one can relatively easily become a party through intervention and, if necessary, appeal the denial of the requested intervention.

B. Petitioner's Claimed Conflict Among the Circuits is Illusory.

Petitioner suggests that there is a widening split among the Circuits on this issue of standing, and that the Fifth, Eighth, Tenth and Eleventh Circuits are "in direct conflict" with the Third, Sixth, Seventh and Ninth Circuits. This is simply not the case. A

careful reading of the citations advanced by Petitioner reveals no such conflict.

1. Ninth Circuit

Although Petitioner asserts that the Ninth Circuit has "established that an unnamed class member has standing to appeal a settlement agreement," Cert. Pet. p.13, the fact is that there has been no post-*Guthrie/Marino* decision in the Ninth Circuit which squarely deals with this issue. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), was decided a decade before *Guthrie* and *Marino*, and did not squarely address the question of whether intervention under Rule 24 is required to obtain standing to appeal a class action settlement. *Marshall* arose out of a settlement of a class action involving a pyramid scheme. Numerous class actions with differing and somewhat conflicting definitions of the class were consolidated into one action. After the case was settled, an appeal was brought by an entity sued as a defendant in one case, but also part of a defined plaintiff class in another. While it was appellants' status as class members that ultimately served as a basis for standing to appeal, the issue of whether formal intervention under Rule 24 was required was never raised by the parties or addressed by the Court.[12]

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12. The *Marshall* court ultimately rejected the appellants' argument that they were not adequately represented, stating:

> Appellants had the right and opportunity to opt out in this action. They chose not to. We believe that they should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by the settlement.

550 F.2d at 1177.

Similarly, in *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), another pre-*Guthrie/Marino* decision, which concerned a multidistrict antitrust class action wherein the plaintiffs sought a writ of mandamus with respect to the district judge's recusal, the court specifically stated, "We need not decide the general question whether class members are in fact 'parties' to a class action suit .... Here, we need decide only if, for purposes of [28 U.S.C.] section 455, stock ownership in a class member constitutes an interest in a 'party to the proceeding.' " *Id.* at 1310. The issue of intervention was neither raised nor decided. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981), also a pre-*Guthrie/Marino* decision, involved a discrimination action brought pursuant to Rule 23(b)(2) which does not require that unnamed plaintiffs be allowed to opt out. Thus, the Court's statement in dicta that the unnamed class member who appeared and objected to the settlement could have challenged the settlement by direct appeal is neither significant nor relevant.[13]

Finally, *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992), the only post-*Guthrie/Marino* Ninth Circuit authority cited by Petitioner, involved an appeal by an unnamed class member of the district court's denial of his motion to opt out of the settlement of a securities action. In *Silber* the class member received notice too late to opt out, as he desired, but in time for the Rule

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13. The fact that the *Dosier* court, in making this statement relied upon *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970) is, however, significant. As discussed *infra*, Respondents submit that the *Asgrow* court's statement that one who intervenes, or "even appears in response to a notice," may maintain an appeal, referred to the non-opt out class claims under Rule 23(b)(1) and (2), which were asserted in that case and not the Rule 23(b)(3) claims. *Dosier* supports this interpretation, and contradicts Petitioner's assertion that, as opposed to class members in a 23(b)(3) class action, "class members in Rule 23(b)(1)&(2) actions need to intervene pursuant to Rule 24 if they wish to appear before a district court for any purpose." Cert. Pet. p.3.

23(c)(2)(C) hearing. The *Silber* court did not, as Petitioner contends, hold that as long as an unnamed Rule 23(b)(3) class member appears in response to a notice of hearing of proposed settlement and puts forth his objections, he can attack the dismissal or compromise on appeal. Rather, the court found that, because one of the protective mechanisms of Rule 23 was not heeded, (in that case adequate notice) "Appellant might have more properly moved the district court for relief from the proceedings pursuant to Fed.R.Civ.P. 60(b)(4) on the grounds that the proposed settlement was void as to him . . . . [W]e find no barrier to construing what was done as in effect a 60(b)(4) motion made pursuant to that provision," 957 F.2d at 700, and allowed the appeal on that basis. The court in *Silber* never addressed the issue of intervention.[14]

2. Seventh Circuit

The notion that the Seventh Circuit law conflicts with the prevailing view articulated in *Guthrie* is also highly questionable. Petitioner cites a 1970 opinion of the Seventh Circuit, *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), in support of the view that the Seventh Circuit does not require formal intervention to obtain standing to appeal. However, a review of that opinion, and subsequent opinions that have considered it, reveals that Petitioner's interpretation is incorrect.

Asgrow arose out of a consent judgment as to the validity of a patent and an infringement of that patent, and an antitrust action. The antitrust action was maintained as a class action under Rule 23(b)(3), from which there is a right to opt out. The infringement action was maintained as a class action under Rule 23(b)(1) and

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14. In the instant case, Petitioner never challenged of Notice in the district court and never attempted to opt out of the class.

(2), from which there is no right to opt out. With respect to the antitrust action, the Court specifically stated:

> We need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations *since the failure of appellants to formally intervene, after receipt of notice under Fed.R.Civ.P. 23(e) before final judgment forecloses their right to appeal.*

Asgrow, 425 F.2d at 1060, n.2 (emphasis added). *Asgrow* is consistent with *Guthrie* on this issue. While confusion in the reading of *Asgrow* arises from a further statement by the court with respect to the non-opt out class claims under Rule 23(b)(1) and (2) that one who intervenes or "even appears in response to a notice," may maintain an appeal, the above language is clear on the issue of the need to intervene.

In *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993), the Tenth Circuit squarely pointed out that *Asgrow* did not support the notion that formal intervention was not required. After pointing to the above-quoted *Asgrow* footnote, the court in *Gottlieb* stated:

> Thus, in the only portion of the *Asgrow* decision directly parallel to the situation in this case, the Seventh Circuit held that formal intervention was a prerequisite to the right of appeal.

11 F.3d at 1011. As the *Gottlieb* court noted, *Asgrow* stands for the same proposition as *Guthrie* in the context of a Rule 23(b)(3) class.

Further, the other Seventh Circuit authorities relied upon by

Petitioner for his argument that *Asgrow* is contrary to *Guthrie*, demonstrate that Petitioner's reliance is misplaced. The most recent Seventh Circuit decision cited by Petitioner suggests that the Seventh Circuit is likely to follow *Guthrie* if squarely confronted with this issue. In *In the Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a Seventh Circuit panel appeared reluctant to depart from what it construed as the Circuit's prior holding in *Asgrow*, but failed to apply *Asgrow* so as to permit an appeal from a class member who had not intervened. After citing *Guthrie* and finding that its reasoning was "persuasive," the court in *VMS* held that an unnamed class member who had failed to intervene could not appeal a post-judgment order implementing the settlement agreement. The Seventh Circuit's opinion in *VMS* reflects a clear departure from any notion that a class member who fails to formally intervene has standing to bring an appeal.

Tryforos v. Icarian Development Co., S.A., 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976), also supports the interpretation that the language appearing in the body of the *Asgrow* opinion applies only to non-opt out classes. Petitioner incorrectly paraphrases the Court's holding. What the *Tryforos* court actually stated in footnote 22 is, "The law is clear that a non-party shareholder who appears, *pursuant to a Rule 23.1 notice*, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." 518 F.2d at 1263, n.22 (emphasis added). Similarly, *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980), involved a non-opt out class action brought pursuant to Rule 23(b)(2).

No Seventh Circuit opinion has held that an unnamed class member in a Rule 23(b)(3) class action need not intervene in order to have standing to appeal an adverse final judgment. Indeed, *Asgrow*, like *Guthrie*, stands for the opposite proposition.

3. Sixth Circuit

Petitioner's assertion that the Sixth Circuit adheres to the axiom that an unnamed class member who objects to a settlement agreement has standing to appeal all aspects of the agreement is simply unsupportable. In *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994), the court, after discussing *Guthrie* in detail, and noting that it "appears to be the progenitor of the modern trend" with respect to non-named individual class members who seek to appeal, clearly held that, "A non-named class member has standing to appeal a settlement order *if he has formally intervened in the action* . . . ." *Id.* at 1061. (emphasis added). The court went on to delineate two exceptions to the mandatory intervention rule, stating:

> However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. A non-named party may also have standing to appeal if the district court has otherwise "summoned" him into court. Of course, as the Supreme Court has indicated, "the better practice is...to seek intervention for purposes of appeal."

Id. at 1061 (*quoting Marino v. Ortiz*, 484 U.S. 301, 304 (1988)).[15]

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15. The two exceptions to the mandatory intervention rule cited in *Shults* stem from two pre-*Guthrie/Marino* Sixth Circuit opinions, *Sertic v. Carpenters Dist. Counsel*, 459 F.2d 579 (6th Cir. 1972), and *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942). In *Cohen*, an unnamed class member "received an order in a class shareholder derivative suit to show cause why a proposed settlement should not be approved by the district court." *Shults*, 35 F.3d at 1059. The class member appeared at the hearing, objected to the settlement, and petitioned to intervene as a plaintiff, which petition was denied. The class

(Cont'd)

Petitioner's assertion that the notice required in a Rule 23(b)(3) class action is the equivalent of being "summoned into court" (and therefore tantamount to some mandatory intervention) is disingenuous at best. In fact, the Sixth Circuit in *Shults*, after noting that the notices at issue there, like the notice in the instant action, provided that a class member "may" appear at the settlement hearing, either on his own behalf or through counsel of his own choice, specifically rejected this notion:[16]

> The appellants have not intervened in this action. Nor did they seek to intervene. Further, the notices in this case do not satisfy the requirement in *Cohen* that the appellants be haled into court. The district court allowed, pursuant to Rule 23(e), for their appearance to make objections. However, as

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(Cont'd)
member appealed the order approving the settlement, but not the order denying him intervention. The Sixth Circuit held that the appellant's appearance in court pursuant to a "notice to show cause why the settlement should not be approved" was "like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal." *Cohen*, 127 F.2d at 724 (citations omitted). The *Shults* court thus determined that "under *Cohen*, an unnamed member of a derivative suit who has not been allowed to intervene may nonetheless have standing to appeal if the district court has haled him into court." 35 F.3d at 1060.

In *Sertic*, non-named class members whose petitions to intervene had been denied by the district court, had standing to appeal, because, "the appellants who were successful in their appeal of the denial of their petitions to intervene, were essentially intervening parties and accordingly had the rights of such parties, including the right to appeal an adverse final judgment." *Shults*, 35 F.3d at 1060.

16. The Notice sent to Class members herein also allowed for their appearance on a non-mandatory basis. *See* Resp. App. 46a-47a.

> explicitly stated in the first notice, their appearance was not of a mandatory nature. We are hard pressed to say that the appellants here were like defendants "summoned by process of court." *Cohen*, 127 F.2d at 724. Therefore, the appellants lack standing to bring this appeal because, by not intervening in this action below and not seeking to intervene, they have not satisfied the requirements of *Sertic*, and because the record indicates that the requirements of *Cohen* have not been satisfied.

35 F.3d at 1061.[17]

It cannot, in good faith, be argued that the Sixth Circuit is in "direct conflict" with the Eleventh Circuit and other Circuits which have held that unnamed class members generally lack standing to appeal class settlements.

4. Third Circuit

Finally, Petitioner's assertion that the Third Circuit has rejected the *Guthrie* approach is also suspect. While Third

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17. The Sixth Circuit in *Shults* further stated:

> We note, too, that the *Cohen* requirement is in accord with the public policies identified in and underlying *Guthrie* and subsequent cases. . . . [B]ecause the manageability of class litigation depends, at least in part, on the absence of numerous individual and divergent interests, those interests must do more than merely appear and object in order to have standing to appeal.

35 F.3d at 1060.

Circuit case law suggests a Third Circuit panel might well rule contrary to *Guthrie* in the context of a class action, no Third Circuit panel has squarely done so.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), several class members moved to intervene following certification of the class in an asbestos case. The court denied both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). The proposed intervenors then took an immediate appeal. The Third Circuit dismissed the interlocutory appeal on the theory that, under its prior holding in *Ace Heating & Plumbing, Inc. v. Crane*, 453 F.2d 30 (3d Cir. 1971), the class members who had been denied intervention would later have the right to appeal from any settlement in the case. The *Carlough* court in *dicta*, sought to distinguish the contrary holdings in *Croyden*, *Guthrie* and *Walker*,[18] so as to suggest that an appeal would be available absent intervention. The *Carlough* case stands for the proposition that the denial of intervention cannot be addressed on an interlocutory appeal. The panel in *Carlough* seemed to accept, without really analyzing, the notion that *Ace Heating* holds that one need not seek to intervene as a party to obtain rights to appeal a class action settlement, and did not address whether such a rule makes sense.[19]

Petitioner also relies on *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). That case arose out of a shareholder derivative action, not a class action. The Third Circuit held that an objector to a shareholder derivative action brought pursuant to Rule 23.1 had standing to object to a settlement even though he

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18. *Gottlieb* and *Shults* had not yet been decided.

19. In fact, the *Ace Heating* opinion did not address the issue of whether intervention under Rule 24 was required. The word "intervention" appears nowhere in the *Ace Heating* opinion, as the issue simply never came up.

did not file a motion to intervene in the district court. While Petitioner suggests that the distinction between a class action and a derivative action is not a meaningful one in the standing analysis, the Third Circuit panel in *Bell Atlantic* clearly recognized that that is not the case. In a footnote, the court noted that, "[I]n derivative suits, unlike shareholder class actions, recoveries belong to the corporation on whose behalf the suit was brought." 2 F.3d at 1307, n.4. The plaintiff in a Rule 23 class action has a personal claim that can be prosecuted outside the context of the class case. The court in *Bell Atlantic* pointed out that at least one rationale offered in support of the intervention requirement does not apply to derivative cases. Specifically, the court noted that in a Rule 23(b)(3) class action a shareholder has a right to opt out of the class and bring his own separate action. *Id.* In a derivative action, the named plaintiff acts solely as a representative for the corporate entity and has no individual stake or claim that can be pursued independently. The Plaintiff in a class action has an individual economic stake in the outcome, because the recovery on a damage claim is paid to the members of the class. In a derivative case, a shareholder who has no monetary interest in the outcome of the case would have little incentive to intervene in an on-going lawsuit. Thus, the factors noted in *Guthrie* as to Rule 23's protections of substantive rights have no application in the context of a derivative case.[20]

In summary, there is no clear or compelling conflict between the Circuits as Petitioner suggests. Petitioner concedes that the Fifth, Eighth, Tenth and Eleventh Circuits all, consistent with *Guthrie,* have held that an unnamed class member who has not intervened in the action lacks standing to appeal an order

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20. The *Bell Atlantic* opinion is also significant in its characterization of *Ace Heating & Plumbing*. Unlike *Carlough*, the court in *Bell Atlantic* noted only that "it is suggested" in *Ace Heating & Plumbing* that an objecting class member need not intervene to protect the right to appeal. *Bell Atlantic*, 2 F.3d at 1309.

approving a settlement. Cert. Pet. pp.7,14. Further, the Sixth Circuit's approach, as set forth in *Shults*, is in accord with the public policies identified in and underlying *Guthrie* and its progeny. The Seventh Circuit is at least leaning in the direction of *Guthrie* as evidenced by *VMS*, and because a close reading of the *Asgrow* opinion suggests that that Circuit's view is actually consistent with *Guthrie*. Finally, the Ninth Circuit does not represent a countervailing view, since the issue of intervention in the same context as the instant action has not been raised or decided. At most, it may be said that the Third Circuit appears to be leaning in a direction contrary to *Guthrie*.

III.

THE APPLICATION OF THE RULE OF *GUTHRIE* DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner has not been denied due process by virtue of the Eleventh Circuit's application of *Guthrie*. Petitioner was given proper notice pursuant to the mandate of Rule 23. He never objected to the Notice in the district court.[21] Rule 23(e) does not require that class members be informed of every procedural step necessary to preserve an appeal. Petitioner's argument to the contrary has been specifically rejected. *See Gottlieb v. Wiles*, 11 F.3d at 1013:

> [Objectors] further argue that the notice of the

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21. Because this issue was not timely raised by Petitioner below, it is questionable whether the issue can properly be raised before this Court. *Insurance Company of North America v. Dynamic Construction Co.*, 1995 U.S. App. Lexis 525 (6th Cir. 1995) (Where appellant did not raise issue until motion for reconsideration, issue was raised too late to be preserved for appeal.); *Midway Finance Corp. v. Walters*, 1992 U.S. App. Lexis 32229 (9th Cir. 1992) (same with respect to issue first raised in a motion made after the entry of the district court's final judgment).

> settlement was constitutionally deficient because it failed to inform the class members of the need to intervene in order to preserve their right to appeal from the approval of the settlement .... Rule 23(e) requires only notice of the proposed dismissal or compromise, not a tutorial on the Rules of Civil Procedure.

Moreover, Petitioner's citations in support of the general principal that a party affected by a final order has standing to appeal such order are inapposite to this action.[22] Petitioner acknowledges that there is an exception to the general rule that a judgment or decree among parties to a lawsuit resolves issues among them, but does not conclude the rights of strangers to those proceedings, where "the non-party is otherwise adequately represented." Cert. Pet. p.19. Among the specific exceptions set forth by this Court in *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) are "class" or "representative" suits. *Id.* (*citing Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940)).

There is a very good reason why class actions are exempt from the general rule. It is because the Federal Rules of Civil Procedure impose procedural regulations on the class action not applicable to any other. The mechanics of Rule 23 assure that class members are afforded minimal due process. If a class action is maintained under subsection (b)(3), minimum due process is guaranteed through the requirements of subsection (c)(2). The class is entitled to notice, as well as the right to opt out of the litigation and not be bound by the class judgment. If class

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22. In fact, the court in *Concorde Resources, Inc. v. Woosley (In re: Woosley)*, 855 F.2d 687 (10th Cir. 1988), relied upon by Petitioner, specifically noted that, "a 'non-party does not have standing to appeal in the absence of most extraordinary circumstances.' " *Id.* at 687 (citations omitted).

members decide to stay in, the Court must still determine whether they would be adequately represented under Rule 23(a)(4). *See* Fed. R. Civ. P. 23, Notes of Advisory Committee, 1966 Amendment ("This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2) is designed to fulfill requirements of due process . . . ."). Because of the various procedural safeguards built into Rule 23(b)(3), as well as the collateral proceedings available to an unnamed class member, as set forth in *Guthrie,* 815 F.2d at 628, requiring a class member, especially one who is represented by counsel, to take the relatively easy step of intervening in an action does not, as Petitioner suggests, "severely impair the due process rights of unnamed class members." Cert. Pet. p.19.

Petitioner is incorrect in his assertion that "only through an appeal and a substantive review of the district court's decision can an appellate court determine whether an unnamed Rule 23(b)(3) . . . class member has become a stranger vis-a-vis the settlement." *Id.* That determination is neither available to Petitioner nor appropriate here. Petitioner had his interests "adequately represented by someone with the same interests who is a party," in this class action. *Martin v. Wilks,* 490 U.S. at 762 n.2. Petitioner never complained of inadequate representation.

Where, as here, the unnamed class member never bothered to intervene, never objected to the notice in the district court, and only became involved in the action at the "eleventh hour,"[23] and where the record indicates the district court judge's familiarity

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23. As the district court stated to Petitioner's Counsel at the Settlement Hearing:

> Where were you, representing your client, in all of those prior hearings when this record was being made?

R13-46.

with the litigation, such second guessing of the district court's determination would simply vitiate the court's role in class litigation and render the representative framework of Rule 23 meaningless. Petitioner was afforded full due process.

CONCLUSION

Petitioner has not demonstrated any true split among the Circuits. Petitioner simply failed to follow clear Eleventh Circuit precedent that required him to intervene in order to establish the right to prolong this litigation through appeals. For the reasons stated above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — PLAINTIFFS' REPLY MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

THIS DOCUMENT RELATES TO ALL ACTIONS

JURY TRIAL DEMANDED

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Appendix A

PRELIMINARY STATEMENT

William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), of Southeast Banking Corp. ("Southeast") has filed a Memorandum of Law ("Brandt Mem.") in Opposition to Plaintiffs' Counsel's Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses ("Joint Petition").[1] Mr. Brandt's opposition, in essence, advocates ignoring the mandate of the Eleventh Circuit as set forth in *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) ("*Camden I*"), and instead returning to the "lodestar" method of calculating attorneys' fees as set forth in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1974), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976).

Mr. Brandt's Memorandum contains a number of misstatements of fact and is supported solely by inapplicable authority.[2] Moreover, this Court should note that the

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1. Although the Certificate of Service on Brandt's opposition Memorandum states that it was served by "regular mail" on October 31, 1993, October 31, 1993 was a Sunday and, as indicated by the envelope in which the opposition Memorandum was received (a copy of which is attached hereto as Exhibit "1"), the opposition Memorandum was postmarked on November 1, 1993. Thus, this Reply would have been due on November 11, 1993. Because November 11 is a "legal holiday" as defined in Rule 6, Fed. R. Civ. P., this Reply is being filed on Friday, November 12, 1993.

2. Before the Court attaches any credibility to the representations of Mr. Brandt's counsel herein, J. Joseph Bainton, Esquire, the Court should review the Second Circuit opinion in *Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1128 (2d Cir. 1989) in which Mr. Bainton, consistent with his conduct in this Court, was sanctioned for vexatious litigation and demonstrated his view of

(Cont'd)

Appendix A

"Administrator" is also the "Trustee in Bankruptcy" for Southeast and has filed a number of actions which seek to recover from the same sources of funds that will fund the settlement herein. Mr. Brandt has been unsuccessful to date, however, in his efforts to litigate against the former officers and directors of Southeast, and based upon his own predictions as to the value of Southeast's Estate, there is little chance that Southeast shareholders will derive any benefit at all from the activities of the Trustee. Notwithstanding this, special counsel for the Trustee, Mr. Bainton and his former law firm have been paid enormous fees by the bankrupt Estate and appear to be seeking an avenue to justify additional awards through this collateral and unjustified attack on Plaintiffs' counsel herein.[3]

Given the complete lack of legal authority to support Mr. Brandt's position, as well as the suspect motives of Mr. Brandt and his counsel, this Court should give short shrift to the

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litigation as akin to a sport. ("In this Court, as well as in the district court, attorney Bainton has demonstrated a blatant disregard of the rules and regulations which permit the judicial machinery to function smoothly. An obligation is imposed on this Court to exercise its disciplinary powers to deter such happenings in the future.")

3. Originally, J. Joseph Bainton, Esquire and the law firm of Whitman & Ransom were retained by the Trustee and approved by the bankruptcy court as special counsel to the Trustee to investigate and prosecute the Trustee's claims against former officers and directors of Southeast and against former attorneys and accountants of Southeast. Effective February 1, 1993, Whitman & Ransom determined that they could no longer represent both the Trustee and the FDIC. As a result, Mr. Bainton withdrew from Whitman & Ransom and joined Ross & Hardies which has been substituted as special counsel in place of Whitman & Ransom. *See* Whitman & Ransom's Application for Final Compensation and Reimbursement of Expenses, attached to the Joint Petition as Exhibit "L," pp. 2, 6, 7. Mr. Bainton and Ross & Hardies are representing the Trustee/Administrator in his opposition to Plaintiffs' counsel's fees herein.

objection. Plaintiffs' counsel submit, as set forth in the Joint Petition, that an award of counsel fees representing 25% of the settlement fund is reasonable under the controlling authority of this Circuit and should be approved.

I. IT IS UNCLEAR WHETHER BRANDT HAS STANDING TO OBJECT TO THE SETTLEMENT

An objector to any portion of a class action settlement has the burden of establishing that he has standing to object. *In Re: School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1622 (1991). Brandt in his capacity as bankruptcy Trustee, apparently also acts as co-administrator of the Plan. It is unclear, however, whether the Plan is a member of the Class. If the Plan is not a member of the Class, there is no standing to object.

After Class counsel received Brandt's opposition to their fee petition, they sent a facsimile to counsel for the Trustee of the Plan seeking Plan documents that would disclose the scope of the Administrator's authority and the process through which stock was purchased by the Plan and allocated to its participants. (*See* Letter from Michael J. Pucillo to Sharon Dixon Dated November 9, 1993, a copy of which is attached hereto as Exhibit "2.") This information would presumably shed some light on how Plan shares were purchased, who has authority to act for the Plan, and whether Brandt has standing to object to the settlement. To date, Class counsel has not received any documents from the Plan Trustee.

Without reviewing the Plan documents, it is impossible to determine whether Brandt, as Plan Administrator (as opposed to the Plan trustee), has independent authority to object on behalf of the Plan. *See In Re: American Continental Corp./Lincoln Savings*

and Loan Sec. Litig., [Current Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶97,656 at 97,039 n.1 (D. Ariz. June 2, 1993) (where ESOP Administrator objected to the scope of the class period, Court specifically pointed out that the ESOP Plan Trustee supported and joined the Administrator's position).[4]

If the Plan did not purchase Southeast stock on the open market, or the Plan did not purchase Southeast stock during the Class Period, the Trustee has no standing.[5] *See, e.g., American Continental*, [Current Transfer Binder] Fed. Sec. L. Rep. at 97,039-40 (ESOP is part of class only if stock was "*actually* purchased" by the ESOP (as opposed to merely allocated to its participants) during the Class Period). Because Brandt has not established that the Plan is a member of the Class, he does not have standing to object to any portion of the settlement, including Plaintiffs' attorneys' fees. Brandt has not met his burden of establishing that he has authority to represent the Plan or that the Plan is a member of the Class.

II. MR. BRANDT CANNOT REPRESENT THE CLASS DUE TO HIS CONFLICTING LOYALTIES

Brandt, the sole objector to any part of the Class settlement, wears multiple hats as both Trustee of the Chapter 7 Estate of Southeast and Administrator of the Plan. Brandt cannot be permitted to switch hats whenever he chooses to pursue

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4. Significantly, the Plan Trustee, First Union National Bank of Florida, N.A., joined Brandt's Emergency Motion for an Order Adjourning the Hearing Date, but has not joined Brandt's objection to Class counsel's fee petition. Thus, because Brandt has failed to establish that the Plan Administrator (in contrast to the Plan Trustee) has the requisite authority to object on behalf of the Plan, Brandt lacks standing to object.

5. To date, the Plan has not filed a proof of claim.

conflicting and competing interest. Because lawsuits initiated by Brandt as Trustee seek damages against the same defendants as this action by the Class, and seek to recover from the same limited insurance funds available to defendants to pay damages, Brandt's true interests are in conflict with those of the Class.

This conflict becomes clear when Brandt's motion to intervene is compared to his objection. On or about October 15, 1993, Brandt, wearing his bankruptcy Trustee hat, filed a motion to intervene attacking the settlement, not because it was harmful to the Class, but because Brandt perceived it potentially could impair his ability as Trustee to recover damages in competing suits against the defendants. Thus, Brandt was effectively attacking the settlement because it provided relief to the Class potentially at his expense.[6] Now, Brandt has conveniently switched to his Administrator hat on objecting to attorneys' fees — and indirectly to the settlement — as a Class member. In a 180 degree turnaround, Brandt, as Administrator, now questions, *inter alia*, whether the $5 million settlement amount is sufficiently beneficial to the Class to warrant the awarding of the attorneys' fee requested by Class Counsel. (Brandt Mem. at 7.)

An objection raised by a class member with a conflict of interest similar to Brandt's was significantly discounted by the Court in *Podesta v. Pay Television Corp.*, No. 80 Civ. 2819 (WCC) (S.D.N.Y. Jan. 19, 1981) (a copy of *Podesta* is attached hereto as Exhibit "3"). In *Podesta*, a derivative action, the only shareholder to object to the settlement was also a "major creditor" of the corporate plaintiff. In considering the objection as part of the analysis of the "reaction of class members," the Court stated:

Needless to say, where, as here, the sole

6. Plaintiff expresses no opinion on the validity of Brandt's contention that the Class settlement may impair his claims as Trustee against the defendants.

> ***objectors to a settlement appear to be motivated by concerns extraneous and even inimical to the legitimate interests of the class, the reaction of class members must be regarded as evidencing the fairness, reasonableness and adequacy of the settlement.***

Id. (emphasis added).

The *Podesta* Court recognized that an objection by one whose interests conflict with those of the Class must be discounted, notwithstanding the objector's status as a Class member. Like the objection in *Podesta*, Brandt's objection must be viewed in light of the objector's internal conflict of interest.

The efforts of Mr. Brandt as Trustee and his counsel Mr. Bainton have, so far, been unsuccessful with respect to their claims against the former officers and directors of Southeast. Originally, Mr. Brandt filed an action on June 16, 1992 against various former officers and directors of Southeast and on September 4, 1992 the FDIC sought to intervene in that action. Mr. Brandt took the position that the claims in his complaint were claims by Southeast against its own officers and directors which belonged to the Trustee and not to the FDIC. On April 29, 1993 Magistrate Judge Linnea R. Johnson recommended dismissal of Mr. Brandt's claims noting:

> Plaintiff/Trustee's argument that the holding company is a special stockholder not subject to FIRREA is without basis in law. There is not a single bit of authority to support Plaintiff/Trustee's position.

Appendix A

See Omnibus Report and Recommendation attached hereto as Exhibit "4," p. 10. Subsequently, Judge Aronovitz in large part adopted, ratified and confirmed Magistrate Johnson's recommendation, dismissing all of Brandt's claims which were derivative and turned on acts taken by, and injury to Southeast, with one small exception. The Court stated:

> [A]s the parties have described it, a 'sliver' of Trustee's complaint remains viable. The 'sliver' that remains consists of Trustee's claims in connection with the acquisitions of the two thrift institutions, actions that, at least facially, occurred at the holding company level.

See Omnibus Order dated July 12, 1993, attached hereto as Exhibit "5," p. 8. Apparently, this "sliver" was enough to encourage Mr. Bainton and his former law firm to seek, and obtain, $580,370 for services rendered from May 1, 1992 through January 31, 1993.[7] Thereafter, notwithstanding Judge Aronovitz' Order, the Trustee subsequently filed an action against former officers and directors of Southeast *derivatively* and on behalf of the FDIC in its capacity as Receiver of Southeast Bank, N.A. and Southeast Bank of West Florida as well as separate actions against, *inter alia*, the former outside accountants of Southeast.

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7. Mr. Bainton's former law firm, Whitman & Ransom actually requested fees of $586,478.50 for that time period, with Mr. Bainton logging 127.10 hours at a rate of $310 an hour, and represented to the Bankruptcy Court in their fee petition that "although certain claims alleged against the former officers and directors have been dismissed as derivative of [Southeast Bank, N.A.'s], highly significant claims alleged have been held by Judge Aronovitz to belong to the Trustee." *See* Final Fee Application, p. 19.

Appendix A

In the instant case Plaintiffs' counsel have fought the Defendants for three-and-one-half years, and produces $5 million for the class. In notable contrast Mr. Brandt and his special counsel have filed four lawsuits, none of which has produced anything for Southeast's shareholders. Brandt and Bainton, his counsel have however been paid handsomely for their efforts. The *Miami Herald* reported on September 19, 1993 that "Southeast shareholders still have a long way to go before receiving any cash. The Trustee estimates the Estate will have about $100 million cash. There are $425 million in claims that must be paid before shareholders receive a dime." The true motivation behind the objection lodged herein is to justify additional fees to Mr. Brandt and his counsel.[8]

III. THE OBJECTIONS OF MR. BRANDT AND HIS COUNSEL ARE BASED UPON INAPPLICABLE LAW

A. BRANDT AND HIS COUNSEL IGNORE THE MANDATE OF THE ELEVENTH CIRCUIT AND ADVOCATE A LODESTAR ANALYSIS OF ATTORNEYS' FEES IN THIS COMMON FUND CASE

The various misstatements of law set forth by Mr. Brandt and his counsel Mr. Bainton in their opposition Memorandum reflect, at best, a basic misunderstanding of (1) the differences between common fund fee awards and statutory fee awards, and (2) the Eleventh Circuit's rejection of the lodestar approach and acceptance of the percentage of fund approach for the determination of attorneys' fees in common fund cases. At worst,

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8. Apparently, this is not the first time Mr. Brandt has shown poor judgment in over-litigating claims. *See Brandt v. Schal Associates, Inc.*, 960 F.2d 640, 642 (7th Cir. 1992) ("This case is an unfortunate example of why 'litigation' has taken on a bad name.").

they represent a knowing and deliberate attempt to mislead this Court as to the applicable standards for awarding attorneys' fees in this Circuit.

The Eleventh Circuit in *Camden I* held that "henceforth in this Circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the Class." 946 F.2d at 774. In making this holding, the Court relied heavily on *Court Awarded Attorneys' Fees*, Report of the Third Circuit Task Force, October 8, 1985, (Arthur R. Miller, Reporter), 108 F.R.D. 237 (1985) (the "Task Force Report"). The Task Force Report found that:

> The *Lindy* lodestar approach, or for that matter any method premised upon the number of hours expended, failed to achieve any of the stated goals in common fund cases in which the measure of the recovery is the best determinant of the reasonableness and quality of the time expended.

Camden I, 946 F.2d at 773.[9] The *Camden I* Court also relied on the Supreme Court decision in *Blum v. Stenson*, 465 U.S. 886 (1984) where the Court stated:

> Unlike the calculation of attorneys' fees under the 'common fund doctrine' where a reasonable fee is based upon a percentage of the fund bestowed on the class, a reasonable fee under §1988 reflects the amount of attorney time reasonably expended on the litigation.

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9. The Task Force concluded that the *Lindy* method was a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar . . ." 108 F.R.D. at 258.

465 U.S. at 900 n. 16. After quoting *Blum*, the Eleventh Circuit went on to note:

> The Supreme Court's assertion in *Blum* is not surprising in light of the criticism commentators and lawmakers have leveled against the lodestar and twelve factor methods in common fund cases, and more particularly, against the emphasis placed by such fee computation methods on the number of hours expended.

946 F.2d at 773.

The underlying rationale established by the Task Force Report, the Supreme Court's opinion in *Blum* and the Eleventh Circuit's opinion in *Camden I* is to reject the same burdensome focus on counsel's time characteristic of the lodestar approach that Brandt seeks to engage in here.[10] The question is *not* whether counsel's lodestar in a given case is reasonable, but whether the percentage of the fund requested as attorneys' fees is

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10. *See also Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993):

> Additionally, a percentage of the fund approach is less demanding of scarce judicial resources than the lodestar method. The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable. . . . It is much easier to calculate a percentage of the fund fee than to review hourly billing practices over a long, complex litigation.

reasonable.[11] Thus, Mr. Brandt's and Mr. Bainton's argument that Plaintiffs' counsel must submit "proof that the number of hours spent on this matter was reasonable" (Brandt Mem., p. 8) represents a return to the very quagmire of analyzing time records that *Camden* rejected.

Virtually all of the cases relied upon by Brandt and his counsel to support their proposition are statutory fee cases where the lodestar method was used to calculate attorneys' fees. These cases have no application to this action. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("the standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "); *Ramos v. Lamm*, 713 F.2d 546, 551 (10th Cir. 1983) (determining fees submitted by the plaintiffs pursuant to the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988 and setting forth "standards for district courts to follow in this and similar cases."); *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988)[12]; *United Slate, Tile & Composition v. G&M Roofing & Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) (award of statutory attorneys' fees under Fair Labor Standards Act); *Cantor v. Detroit Edison Company*, 86 F.R.D. 752 (E.D. Mich. 1980) (determination of attorneys' fees in Clayton Act Antitrust case based on lodestar analysis — "number of attorneys' hours spent multiplied by reasonable hourly rate."); *Gutierrez v. City of*

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11. Mr. Brandt and Mr. Bainton fail to note that the *Camden* Court, in an apparent attempt to avoid the kind of backsliding into the lodestar approach advocated in their opposition Memorandum, specifically held out 25% of the fund as a reasonable "benchmark" "which may be adjusted in accordance with the individual circumstances of each case, as opposed to the lodestar hourly fee used in statutory fee awards." 946 F.2d at 775.

12. In *Norman*, the Eleventh Circuit "refined its analysis for determining statutory fee awards" in favor of the lodestar approach. *Camden I*, 946 F.2d at 772.

Hialeah, 729 F.Supp. 1329 (S.D. Fla. 1990) (a Rule 11 case, not a common fund); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366 (E.D. Pa. 1976) (attorneys' fees determined under the *Lindy* lodestar approach). Mr. Brandt simply cannot rely on statutory fee cases to argue fee criteria under a common fund.

Further, in a misrepresentation of *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) *cert. denied*, 488 U.S. 822, 109 S.Ct. 66 (1988), Mr. Brandt and Mr. Bainton assert that the *Brown* opinion stands for the proposition that "attorneys' hours reasonably billed and hourly rate " 'measure the attorneys' contributions, [and] are . . . appropriate in setting and reviewing percentage fee awards in common fund cases.' " Brandt Mem. at 8. That is not true. What the Tenth Circuit actually held in *Brown* was, "Because these *factors* [set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)] measure the attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases." 838 F.2d at 454. Not one of the *Johnson* factors is "attorneys' hours reasonably billed and hourly rate."[13]

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13. The *Johnson* factors are:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (5) any prearranged fee — this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

More importantly, Mr. Brandt and Mr. Bainton fail to reveal that the Court in *Brown* went on to specifically state:

> Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor — time and labor required — is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth *Johnson* factor — the amount involved and the results obtained — may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class . . . we hold here only that in awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater whether to other factors, the basis of which is clearly reflected in the record.

838 F.2d at 456.

Thus, because they rely on inapplicable and irrelevant authority, Mr. Brand and Mr. Bainton make the completely erroneous assertion that, in a common fund case in which fees must be computed on the percentage of the fund method, "parties must be *specific* as to the reasonableness or unreasonableness of the time worked and it is imperative that the attorney seeking an award of fees submit evidence, preferably in the form of contemporaneous time records, which set forth in detail the tasks allegedly performed and the time devoted to those tasks." Brandt Mem. at 10.[14] Tellingly, Mr. Brandt and Mr. Bainton cite no relevant authority where this phantom requirement was imposed.

By contrast, in *Ressler v. Jacobsen*, [1992-93 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,224 (M.D. Fla. 1992), a post-*Camden* common fund case in which the Court applied the percentage of the fund method, the Court, while taking note of the "time and labor required," did not engage the type of audit of plaintiffs' counsel's hours which Mr. Brandt and Mr. Bainton would have this Court do. Rather, the *Ressler* Court compared the *percentage of the fund* requested by counsel to the percentages "customarily found in standard contingency fee arrangements or

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14. This is not the first time that Mr. Bainton has applied erroneous law to a completely distinct legal doctrine. *See Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 677 F.Supp. 740, 760 (S.D.N.Y. 1988) *aff'd in part and rev'd in part, appeal dismissed*, 877 F.2d 1120 (2d Cir. 1989) ("the [plaintiff's, who was represented by Mr. Bainton] application of trademark concepts in a copyright case was an error of law. There is a great difference between the objective of trademark projection and the objective of copyright protection. The two legal doctrines are distinct, different and separate."). Similarly, the Court in *Camden I* acknowledged "the great distinctions between the policies and rationale supporting common fund fee awards versus statutory fee awards" that led to the Third Circuit commissioning the Task Force Report. 946 F.2d at 773.

awarded in class actions." 97,224 at 94,967.[15] That is the proper analysis which should be taken by this Court. Clearly, the adoption of the percentage of the fund approach is an effort to avoid the court having to undertake the tedious task of auditing detailed time records submitted by counsel. As one court has noted:

> A related weakness in the lodestar approach is that it often results in a substantial delay in distribution of the common fund to the class. The lodestar procedure requires detailed involvement by the District Court, evaluating the reasonableness of expenditure of attorney time and effort, and making comparative inquiries on reasonable rates for those services. Given the complexity of many class action lawsuits, combined with the degree of detailed review required and considering the heavy workload of most district court judges, lodestar calculation is likely to cause significant delay between the creation of a common fund and remuneration of class counsel. In contrast, the application of a percentage of the fund methodology is relatively straightforward and much less time consuming.

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15. Indeed, the *Ressler* Court specifically noted, "Under the 'lodestar' analysis, which is *not* the rule applied in this Circuit but which is still used in some circuits, the fee requested would be a 1.16 multiple of the lodestar. Such an award is extremely reasonable as courts in common fund cases regularly award multiples of 2 to 3 times lodestar in attorneys' fees to reflect the quality of the work performed and the risks undertaken." *Id.* (Emphasis in original). In this case, the fee requested would be approximately a 1.28 multiple of the lodestar.

Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1270 (D.C. Cir. 1993).

Indeed, the adoption of the percentage of the fund approach alleviates the need for the Court to engage in a detailed analysis of counsel's time because:

> In the common fund case, if a percentage of the fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them.

Id. at 1269. This concept seems to elude Mr. Brandt and Mr.. Bainton. The inescapable conclusion is that the detailed analysis of Plaintiffs' counsel's time which Mr. Brandt and Mr. Bainton advocate has no place in these proceedings.

Further, although Brandt and his counsel have not directly objected to the settlement amount, they obliquely complain that Plaintiffs' counsel have not produced "evidence" to allow the Court to evaluate the "value" of the settlement and would have this Court disregard the settlement amount. Brandt Mem. at 8. Mr. Brandt and his counsel ignore the 13 pages of Plaintiffs' memorandum in support of the proposed settlement, which delineate and discuss *each* of the criteria for evaluating the fairness of the settlement as set forth in the Eleventh Circuit's opinion in *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984).[16] In their Memorandum Plaintiffs further discuss, *inter*

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16. Notwithstanding Mr. Brandt and Mr. Bainton's representations to the contrary, Plaintiffs' counsel most certainly have presented facts establishing the adequacy of the proposed settlement which include the fact that, "although the total market losses of members of the Class likely exceed $100 million, Plaintiffs' (Cont'd)

alia: the vigorous litigation of this action for the past three years; the fact that Magistrate Johnson has already recommended dismissal of the Third Consolidated and Amended Complaint; the insolvency of Southeast and the seizure of its primary banking subsidiary; the various competing claims — including those asserted by Mr. Brandt — in excess of the amount of available directors' and officers' liability insurance; and the fact that, if any or all of these competing actions were to conclude before Plaintiffs in this action achieve success at trial, there is a substantial risk that the available directors' and officers' liability insurance could be depleted. Contrary to Brandt's assertions, therefore, Plaintiffs' Memorandum in Support of the Proposed Settlement contains an exhaustive analysis of why this settlement, in light of all of the attendant circumstances, is a good settlement.

Moreover, Mr. Brandt and Mr. Bainton once again ignore controlling precedent:

> [I]n evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not try the case in the settlement hearings . . .
>
> . . . The trial court should not make a proponent of a proposed settlement 'justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained;

(Cont'd)
counsel has concluded, based upon data evaluated by their financial expert, that the *provable damages* may be no more than $26 million, assuming Plaintiffs establish the Defendants' liability." Plaintiffs' Memorandum in Support of the Proposed Class Action Settlement at pp. 15-16, 21-22.

> inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).[17] The Court may not substitute its judgment for that of the parties who negotiated the settlement. *Id.*; *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Rather, in determining whether final approval should be granted, the Court must determine whether the proposed settlement falls within the "range of possible recovery." *Behrens*, 118 F.R.D. at 539.

Mr. Brandt and Mr. Bainton also seem to think that this Court can decide "what weight, if any, to give to the terms of this settlement in determining a reasonable fee" (Brandt Mem. at 6) based solely upon *Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977), a pre-*Camden I* case which strictly applied the *Lindy* lodestar approach. Actually, inherent in the percentage of the fund approach is the fact that the *most* important factor is the size of the recovery. Mr. Brandt and Mr. Bainton cannot advocate in good faith, under *Camden I*, that this Court can ignore the size of the settlement in determining a percentage of the fund. It is axiomatic that, if attorneys' fees in common fund cases must be determined as a percentage of the fund, the amount of the fund must be taken into account. *See Camden I*, 946 F.2d at 744. ("[M]onetary results achieved predominate over all other criteria.") *See also Brown* 838 F.2d at 456 ("a decisive factor in this common fund class action case is the amount involved and the results obtained."); *Swedish*, 1 F.3d at 1269 ("In the common

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17. Decisions of the United States Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

fund case . . . the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award.")

B. THE PERCENTAGE OF THE FUND REQUESTED BY PLAINTIFFS' COUNSEL IS REASONABLE UNDER CONTROLLING LAW

Contrary to Mr. Brandt and Mr. Bainton's accusation, Plaintiffs' counsel never suggested that the *Johnson* factors, to the extent applicable in any given case, are not relevant in determining a reasonable fee in a common fund case. However, the Court in *Camden I* unquestionably did reject the lodestar *approach* set forth in *Lindy Brothers* and *Johnson*. Thus, while the *Johnson* factors are relevant, the relative weights given those factors will vary when utilized in the percentage of the fund approach. *See Brown v. Phillips Petroleum*, 838 F.2d at 456. Brandt and his counsel ignore this difference in application and improperly continue to over-emphasize the "time and labor" factor, in essence reinstituting the very "lodestar" approach rejected by *Camden I*.

Plaintiffs' counsel satisfy the criteria outlined in *Camden I, and* address the *Johnson* factors applicable to this case including: the time and labor required; novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment; the experience, reputation and ability of the attorneys; and awards in similar cases, as well as an additional factor noted by the Court in *Camden I* — the economics involved in prosecuting a class action. *See* Plaintiffs' Memorandum in Support of Proposed Settlement, pp. 27-35. Another additional factor set forth by the Court in *Camden I* is relevant to evaluating the fee award is "any substantial objections by class members or other parties to the

settlement terms or the fees requested by counsel." 946 F.2d at 775. In this regard it should be noted that there have been no objections to the settlement amount by any *bona fide* Class member. Further, Mr. Brandt is the only person who has objected to Plaintiffs' counsel's fee request. This is true notwithstanding the fact that more than *47,500* notices were mailed to Class members, as well as nominees and brokers.

As indicated by the Court in *Ressler*, an important factor in analyzing a fee request using a post-*Camden* percentage of the fund approach is whether the fee requested by petitioners when considered in terms of a percentage of the fund "is fair and reasonable when compared to the percentages customarily found in standard contingency fee arrangements or awarded in class actions." ¶97,224 at 94,967.

Although Plaintiffs' counsel have previously set forth a list of fee awards in various cases throughout the country well in excess of the 25% of the common fund requested herein,[18] set forth below (and attached hereto as Exhibits "6" through "11") are orders in six recent

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18. Mr. Brandt and Mr. Bainton misleadingly contend that Plaintiffs' counsel are requesting a fee of "over 33.3% of the amount to be received by all of the Plaintiffs." Brandt Mem. at 2. This is incorrect. Plaintiffs are requesting 25% of the common fund obtained for the benefit of the Class. Apparently Mr. Brandt and Mr. Bainton arrive at the 33.3% figure by subtracting the amount of Plaintiffs' fee request from the common fund and then comparing that amount to the remaining amount of the fund. This is clearly an inappropriate, and highly disingenuous, analysis under the percentage of the fund approach and Mr. Brandt and Mr. Bainton can cite no authority in support of their type of analysis. Rather, normal market conditions should be employed in determining contingent fees. *In Re: Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation had one been feasible."). Contingent fees are typically calculated as a percentage of the gross recovery.

common fund cases, five from this Court and one from the Middle District of Florida wherein fees equal to or in excess of 25% of the settlement fund were awarded: *In Re: Aero Systems, Inc. Securities Litigation*, Civil Action No. 90-0083-CIV-Paine (S.D. Fla. Oct. 19, 1993) (28% of $1,550,000 settlement); *In Re: Royce Laboratories, Inc. Securities Litigation*, Civil Action No. 92-0923-CIV-Moore (S.D. Fla. Sep. 28, 1993) (30% of settlement fund); *CV Reit, Inc. v. Levy, et al.*, Civil Action No. 91-8177-CIV-Gonzalez (S.D. Fla. Sep. 24, 1993) (26.9% of $2.45 million settlement); *In Re: Perfumania, Inc. Securities Litigation*, Civil Action No. 92-1490-CIV-Marcus (S.D. Fla. Sep. 22, 1993) (30% of $850,000 settlement); *Kaser v. Swann*, Civil Action No. 90-607-CIV-ORL-3A18 (M.D. Fla. April 13, 1993) (30% of net settlement fund after deduction of costs and expenses); *In Re: FPL Group Consolidated Litigation*, Civil Action No. 90-8461-CIV-Nesbitt (S.D. Fla. Feb. 24, 1992) (25% of settlement fund of $12.5 million).

Plaintiffs submit that, in light of the foregoing, Plaintiffs' counsels' request for 25% of the settlement fund is reasonable and should be approved by this Court.

Dated: November 12, 1993

Respectfully submitted,

CHIMICLES, BURT & JACOBSEN

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Appendix A

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and

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Mark Gardy
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Attorneys for Plaintiffs

Appendix A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail to J. Joseph Bainton, Esq., Ross & Hardies, Park Avenue Tower, 65 East 55th Street, New York, NY 10022-3219; Lewis F. Murphy, Esquire, Steel Hector & Davis, 4000 S.E. Financial Center, Miami, Florida 33131, and Robert T. Wright, Esquire, Mershon, Sawyer, Johnston, Dunwody and Cole, 4500 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131; and by U.S. Mail to all other parties on the attached Service List, this 12th day of November, 1993.

s/ Andrew H. Kayton
ANDREW H. KAYTON, ESQUIRE

Appendix A

SERVICE LIST
IN RE: SOUTHEAST BANKING COP.
SECURITIES LITIGATION

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APPENDIX B — NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT, SETTLEMENT HEARING, AND RIGHT TO APPEAR AND NOTICE TO NOMINEES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT, SETTLEMENT HEARING, AND RIGHT TO APPEAR AND NOTICE TO NOMINEES

TO: ALL PERSONS WHO PURCHASED OR OTHERWISE ACQUIRED PUBLICLY TRADED SECURITIES OF SOUTHEAST BANKING CORP. DURING THE PERIOD FROM FEBRUARY 27, 1989 THROUGH AND INCLUDING SEPTEMBER 20, 1991. THE TERM "SECURITIES" INCLUDES COMMON STOCK, PREFERRED STOCK, CAPITAL NOTES, NOTES, CONVERTIBLE SUBORDINATED DEBENTURES, NON-CONVERTIBLE DEBENTURES AND/OR SECURITIZED ASSET INTERESTS.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION. IF YOU

Appendix B

PURCHASED OR ACQUIRED SOUTHEAST SECURITIES DURING THE PERIOD OF TIME DESCRIBED ABOVE (THE "CLASS PERIOD"), YOU MAY BE A CLASS MEMBER, ULTIMATELY ENTITLED TO RECEIVE BENEFITS PURSUANT TO THE PROPOSED SETTLEMENT DESCRIBED HEREIN, AND MAY BE BOUND BY A JUDGMENT RELEASING ANY CLAIMS THAT YOU MAY HAVE AGAINST THE DEFENDANTS, FORMER OFFICERS AND DIRECTORS OF SOUTHEAST AND OTHER RELEASED PARTIES. IF YOU WERE NOT THE BENEFICIAL OWNER OF SOUTHEAST SECURITIES AS DESCRIBED ABOVE DURING THE CLASS PERIOD, PLEASE TRANSMIT THIS DOCUMENT TO SUCH BENEFICIAL OWNER.

THE SETTLEMENT DESCRIBED IN THIS NOTICE IS SUBJECT TO COURT APPROVAL. THE COURT HAS NOT YET FINALLY CONSIDERED THE FAIRNESS OR ADEQUACY OF THE PROPOSED SETTLEMENT AND HAS NOT YET DETERMINED THE AMOUNT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES TO BE AWARDED TO COUNSEL FOR THE REPRESENTATIVE CLASS PLAINTIFFS. THIS NOTICE IS NOT AN EXPRESSION OF ANY FINAL OPINION OF THE COURT AS TO THE REASONABLENESS OF THE PROPOSED SETTLEMENT OR ANY APPLICATION FOR ATTORNEYS' FEES AND EXPENSES. THE COURT WILL NOT RULE ON THE PROPOSED SETTLEMENT OR FEE APPLICATION UNTIL THE HEARING DESCRIBED BELOW.

IF YOU PURCHASED OR ACQUIRED SOUTHEAST SECURITIES DURING THE CLASS PERIOD FOR THE BENEFICIAL INTEREST OF A PERSON OTHER THAN

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YOUSELF, IT IS IMPORTANT THAT YOU READ THE "SPECIAL NOTICE TO SECURITIES BROKERS AND OTHER NOMINEES" AT THE END OF THIS DOCUMENT.

IF YOU ARE A "RELEASED PARTY" AS DEFINED ON PAGE 3 OF THIS NOTICE, YOU SHOULD SEE THE "SPECIAL NOTICE TO RELEASED PARTIES" AT THE END OF THIS DOCUMENT.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States Distrct Court for the Southern District of Florida (the "Court") dated August 27, 1993, that a hearing will be held before the Honorable Kevin Michael Moore in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128 at 8:30 a.m. on November 15, 1993 (the "Settlement Hearing") to determine whether a proposed settlement (the "Settlement") of the above-captioned litigation (the "Litigation") between class Representative Plaintiffs Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, individually and as representative of all Class Members (as hereinafter defined), and Defendants John E. Porta, Charles J. Zwick, Paul L. Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (sometimes collectively referred to as the "Defendants"), as set forth in the Stipulation of Settlement dated August 19, 1993 (the "Stipulation"), is fair reasonable and adequate, and in the best interests of the Class Members, and to determine to what extent attorneys' fees,

reimbursement of expenses and individual awards to the named Plaintiffs should be awarded.

NOTICE OF CLASS ACTION DETERMINATION AND BACKGROUND OF THE LITIGATION

Pursuant to an Order entered by the District Court on August 27, 1993, the Court has certified this Litigation as a Class Action for settlement purposes on behalf of all persons who purchased or otherwise acquired publicly traded securities including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and securitized asset interests of Southeast Banking Corporation and its former corporate parents, subsidiaries (including Southeast Bank, N.A.), predecessors, successors and assigns ("Southeast") during the period from February 27, 1989 through and including September 20, 1991, excluding the Defendants herein, the former officers and directors of Southeast, members of their immediate families, their heirs, and affiliates, successors, and assigns of the Defendants.

If you do not elect to be exluded from the Class by following the steps described below, you are a "Class Member" and will be eligible to participate in the benefits of the Settlement as described herein, and will be subject to the terms of a Final Order and Judgment to be entered herein, barring you from pursuing any claims, rights, or causes of action that you may have against Defendants or other officers, directors, attorneys, advisors, insurers, agents or representatives of Southeast.

Following an investigation by Plaintiffs' counsel, on March 22, 1990, a class action complaint was filed in this

Court, captioned *Harvey Wiener v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760. Shortly thereafter, another class action was filed in this Court, captioned *William J. Hall v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838.

On April 6, 1990, Unitd States District Judge Eugene P. Spellman entered an Order of Consolidation and Reference consolidating the two actions and referring them to United States Magistrate Judge Linnea R. Johnson. On April 24, 1990, Magistrate Judge Johnson ordered that the cases be consolidated and that all pleadings be filed under Case No. 90-0760-CIV-EPS. On April 23, 1990, the actions were filed as one consolidated, amended complaint. Thereafter, on April 27, 1990, a Second Consolidated Amended Complaint was filed to correct certain matters. Defendants moved to dismiss the Second Consolidated Amended Complaint. On or about July 18, 1990, Magistrate Judge Johnson, upon the stipulation of the parties, granted Plaintiffs leave to file a Third Consolidated Amended Complaint. In that Complaint, Plaintiffs The Maynard Slessinger Trust and Paula P. Folkman joined in the action, alleging purchases of Southeast Banking Corp. securities during the second quarter of 1990. The Defendants moved to dismiss Plaintiffs' Third Consolidated Amended Complaint, On June 26, 1991, after hearing argument on Defendants' Motion to Dismiss Plaintiffs' Third Consolidated Amended Complaint, Magistrate Judge Linnea Johnson recommended the dismissal of the Third Consolidated Amended Complaint. On July 11, 1991, Plaintiffs filed objections to and moved to vacate the Magistrate's Report. However, those motions were never ruled upon and became moot due to subsequent intervening events.

On September 19, 1991, the Comptroller of the Currency

declared insolvent Southeast's principal subsidiary banks, Southeast Bank, N.A. ("Southeast Bank") and Southeast Bank of West Florida, and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver of those banks. On September 20, 1991, Southeast Banking Corp. filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code. The failure of Southeast Banking Corp. and its subsequent filing for Chapter 7 protection affected the Plaintiffs' ability to pursue their claims brought against that corporation, but did not eliminate the claims against the individual defendants named in the Third Consolidated Amended Complaint.

On November 7, 1991, Plaintiffs Wiener, Hall, The Maynard Slessinger Trust and Folkman, previously Plaintiffs in this action, as well as Plaintiffs Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, who sought to join as Plaintiffs in this action, moved to file a Fourth Consolidated Amended and Supplemental Complaint. The proposed Fourth Consolidated Amended and Supplemental Complaint deleted Southeast as a Defendant and sought recovery from the remaining Defendants, in addition to that sought in the Third Consolidated Amended Complaint, on behalf of those persons who purchased common stock and debentures of Southeast during the period from June 15, 1990 through July 3, 1991. On March 12, 1992, Unitd States District Judge William J. Zloch granted Plaintiffs' Motion to File a Fourth Consolidated Amended and Supplemental Complaint.

On June 16, 1992, the Trustee in Bankruptcy for Southeast Banking Corp. initiated an action against certain of the Defendants named in the Fourth Consolidated Amended and Supplemental Complaint, and other former officers and directors of Southeast Banking Corp., alleging

mismanagement and breaches of fiduciary duty, in an action styled *William A. Brandt, Jr. v. Florence S. Bassett, et al.*, Case No. 92-1600-Civ-Aronovitz (the "Trustee Suit"). On September 4, 1992, the FDIC moved to intervene in the Trustee Suit asserting that any claims that exist for mismanagement and breaches of fiduciary duty would be solely and exclusively the rights of the FDIC. The FDIC's Motion to Intervene was granted and, subsequent to the FDIC's Intervention in the Trustee Suit, both the FDIC and the Trustee moved for summary judgment on the issue of ownership of the claims. Both the Trustee and FDIC have asserted claims in excess of the amount of the available directors and officers' liability insurance, and each claim is viewed by Plaintiffs' lead counsel as a competing claim to the claims asserted on behalf of the Class in the Fourth Consolidated Amended and Supplemental Complaint.

On April 29, 1993, United States Magistrate Linnear R. Johnson recommended that the Trustee Suit be dismissed, and that the FDIC's Motion for Summary Judgment as to the ownership of the claims be granted. Plaintiffs' Lead Counsel thereafter attempted to explore a coordinated prosecution of the Class claims and the FDIC claims, with an appropriate allocation of the recovery to the Class. Those efforts failed, and it became apparent to Plaintiffs' Lead Counsel that the FDIC intends to prosecute its claim as a competing claim to the class action. On May 4, 1993, the Resolution Trust Corporation ("RTC"), acting as the receiver for American Pioneer Savings Bank, also filed a suit against, among others, the Defendants in this action, alleging violations of federal securities law in relation to Southeast. The RTC's suit is also a competing claim to the Class action.

During 1992 and 1993, the case proceeded through

additional motion practice. On August 19, 1993, after substantial investigation and negotiation, the parties entered into a Stipulation of Settlement.

SUMMARY OF SETTLEMENT

In full and complete settlement of all the Released Claims (as defined herein), encompassing all the claims which have or could have been asserted by Plaintiffs and the other Class Members against the Defendants or Released Parties (as defined below), and subject to the terms and conditions of the Stipulation, the Defendants have agreed to pay to Plaintiffs and the Class, the sum of $5,000,000 plus accrued interest thereon. After deducting attorneys' fees and reimbursement of expenses, including notice, the costs of settlement administration expenses, taxes, if any, and any incentive awards to the Named Plaintiffs allowed by the Court, the remaining funds will be distributed to Class Members who have submitted valid Proofs of Claim in accordance with the instructions herein.

Lead Counsel for the Plaintiffs has conducted an examination into and evaluation of the law and facts relating to the matters set forth in the Fourt Consolidated Amended and Supplemental Complaint regarding how best to confer a substantial benefit upon the Class, in light of the substantial obstacles to and risks of establishing liability and damages and the potential duration of this complex litigation.

Based upon their discovery and investigation and evaluation of the facts and law relating to the matters set forth in the Fourth Consolidated Amended and Supplemental Complaint, Plaintiffs' Lead Counsel has concluded that (*i*) irrespective of any merit to the claims asserted in the Fourth

Consolidated Amended and Supplemental Complaint, there are substantial obstacles to collecting any judgment that may be obtained; (*ii*) the attendant risks of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation, could substantially delay or eliminate any meaningful recovery; (*iii*) the uncertainty relating to the proof of the allegations included in the Fourth Consolidated Amended and Supplemental Complaint could jeopardize any recovery; (*iv*) the uncertainties regarding collection of any judgment posed by the competing claims of the Trustee, the FDIC, and the RTC could further jeopardize any recovery; (*v*) the desirability of permitting the Stipulation to be promptly consummated according to its terms is substantial; and (*vi*) resolution of the Litigation as set forth in the Stipulation confers a substantial benefit upon the Class and is in the best interest of the Class.

Defendants deny the material allegations of the Fourth Consolidated Amded and Supplemental Complaint and deny any and all liability with respect to any and all facts and claims alleged or that could have been alleged in this Litigation and continue to deny each and all of the claims and contentions alleged by Plaintiffs in the Litigation. The Defendants nonetheless consider it desirable that the Litigation be settled and dismissed in accordance with the provisions of the Stipulation because it will (*i*) halt the substantial expense, inconvenience and uncertainties associated with continued litigation of Plaintiffs' claims; (*ii*) finally put to rest those claims; and (*iii*) confer a substantial benefit upon the Class and the Defendants including, without limitation, the avoidance of further expense, diversion of resources and disruption due to the pendency of the Litigation.

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The Court has not determined the merits of the claims against, or the defenses of, the Defendants. This notice does not imply that there has been or would be any finding of violation of the law, or that recovery could be had in any amount, if the Litigatgion were not settled with respect to the Defendants.

On October 12, 1993, prior to the Settlement Hearing, the parties will file with the Clerk of the Court any materials in support of the Settlement and pertaining to the other matters to be considered by the Court at the Settlement Hearing, including plaintiffs' counsels' petition for attorneys' fees and petition for reimbursement of costs and expenses.

If the Stipulation and the proposed Settlement are approved by the Court, all claims which have or, based upon the claims alleged, could have been asserted in the Litigation will be dismissed on the merits and with prejudice in accordance with the terms of the Stipulation as to all Class Members (except those who have properly excluded themselves from the Class), and all Class Members shall be forever barred from prosecuting a Class Action or any other action encompassing a Released Claim (as defined below).

The Settlement will become effective at such tme as the Order entered by the District Court finally approving the Settlement shall become final and not subject to appeal, as set forth in the stipulation (the "Settlement Effective Date"). If for any reason any of the contingencies set forth in the Stipulation is not met or complied with in accordance with its terms, then in that event, the Settlement may be terminated.

Upon final approval by the Court of the Settlement, and subject to the contingencies set forth in the Stipulation, all

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Class Members who are not determined by the Court to have properly excluded themselves from the Class shall conclusively be deemed to have remised, released and discharged, absolutely and forever, each and all of the Released Parties (as defined below) of and from any and all Released Claims (as defined below).

The *Released Parties* are the Defendants, and their respective spouses, heirs, executors, administrators, successors and assigns; National Union Fire Insurance Company of Pittsburgh, PA and any other insurers that provide directors' and officers' liability insurance to Southeast, and their directors and officers; and all former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, consultants, affiliates, independent contractors and associates (as defined in SEC Rule 12b-2, promulated pursuant to the Securities Exchange Act of 1934) of Southeast and their respective spouses, heirs, executors, administrators, successors and assigns. EXCEPT THAT ANY CLASS MEMBER WHO FILES A PROOF OF CLAIM SEEKING TO BENEFIT FROM THE SETTLEMENT FUNDS SHALL NOT BE A RELEASED PARTY.

The *Released Claims* are (*i*) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reaon of any matter, cause or thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast Securities, by a Class Member; and (*ii*) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Class Member had, has

or may in the future have that are or could have been alleged, in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast.

Southeast Securities and/or Southeast's Securities mean any and all securities issued by Southeast and publicly traded during the Class Period, including but not limited to common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and/or securitized asset interests.

Unknown Claims means any existing or future claims, demands, causes of action or rights, against any Released Party that the Class Members do not know or suspect to exist in their favor at the time the Final Order and Judgment is entered in this Litigation, provided that such claim(s) would arise out of, or relate to Southeast, including the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast's Securities.

CLASS MEMBERSHIP, FILING PROOF OF CLAIM, AND CALCULATION OF PAYABLE CLAIMS

TO BE ELIGIBLE TO PARTICIPATE IN THE DISTRIBUTION OF THE SETTLEMENT FUND, YOU MUST COMPLETE AND SIGN THE ATTACHED PROOF OF CLAIM FORM AND SEND IT BY PREPAID FIRST

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CLASS MAIL POST-MARKED ON OR BEFORE DECEMBER 27, 1993 AND ADDRESSED AS FOLLOWS:

Southeast Banking Corp. Securities
Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

IF YOU ARE A CLASS MEMBER AND IF YOU DO NOT TIMELY FILE A PROPER PROOF OF CLAIM FORM AND HAVE NOT EXCLUDED YOURSELF FROM THE CLASS, YOU WILL NOT SHARE IN THE SETTLEMENT FUND. HOWEVER, YOU WILL STILL BE BOUND BY THE FINAL ORDER AND JUDGMENT OF THE COURT DISMISSING THIS LITIGATION AND RELEASING ALL CLAIMS AND POTENTIAL CLAIMS AS SET FORTH ABOVE.

For purposes of the Settlement,

(a) "Claimant" means any Class Member who files a Proof of Claim in such manner and within such time as provided herein;

(b) "Authorized Claimant" means a Claimant who; properly completes the enclosed Proof of Claim form establishing the Claimant's status as a Class Member, who has a "Recognized Loss" as defined below, who has submitted it along with all required documentation to the Settlement Administrator at the address provided on the Proof of Claim form on or before December 27, 1993 on the basis of which the Class Member is found to have a right to participate in the benefits of the Settlement.

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All Proofs of Claim must be submitted by December 27, 1993. Any Class Member who fails to file a proper Proof of Claim with all required documentation by such date shall be forever barred from receiving any payment pursuant to the Stipulation but shall in all other respects be bound by the terms of the Stipulation and the Final Order and Judgment to be entered in the Litigation, including the terms of the release contained in the Stipulation. A Proof of Claim shall be deemed to have been timely submitted if received by the Settlement Administrator or postmarked on or before December 27, 1993.

Each Proof of Claim shall be submitted to and reviewed by the Settlement Administrator under the supervision of Plaintiffs' Lead Counsel, who shall determine in accordance with the Stipulation and the Court's Order with Respect to Notice, Settlement Hearing and Administration, the extent, if any, to which each claim shall be allowed, in the sole discretion of Plaintiffs' Lead Counsel, subject to final review by the Court.

The Settlment Administrator will notify, in writing, all Claimants whose Proofs of Claim have been rejected in whole or in part, setting forth the reasons therefor. Any Claimant whose claim has been finally rejected in whole or in part and who desires to contest such final rejection must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim, serve upon Plaintiffs' Lead Counsel by certified mail a notice and statement of reasons for contesting the final rejection along with any supporting documentation. Any such notice and statement shall be deemed served when actually received by Plaintiffs' Lead Counsel. Plaintiffs' Lead Counsel will thereafter present any such notice along with a response, if desired, for review and final decision by the Court.

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Each Claimant shall be deemed to have submitted to the jurisidiction of the Court with respect to the Claimant's claim, and the Claimant will be subject to discovery under the Federal Rules of Civil Procedure, limited to the Claimant's status as a Class Member, the amount and circumstances of the Claimant's claim, and the contents of the Proof of Claim as submitted.

The Net Settlement Funds consisting of the Settlement Funds, plus accrued interest, less (*i*) Attorneys' Fees and Expenses; (*ii*) Notice and Administration Expenses; and (*iii*) any awards to the Plaintiffs allowed by the Court, shall be allocated among the Authorized Claimants in the following manner (the amount so allocated to each Authorized Claimant constituting his or her "Payable Claim"):

(a) Each Authorized Claimant will be entitled to receive from the Net Settlement Fund that portion of the Net Settlement Fund represented by a fraction of the Net Settlement Fund which equals the individual Recognized Loss of such Authorized Claimant to the sum of all Recognized Losses of the Authorized Claimants;

(b) Each Authorized Claimant's Recognized Loss will be computed as set forth in the following Plan of Allocation:

(i.) All definitions set forth in the Stipulation of Settlement shall govern this Plan of Allocation, and

terms employed herein shall have the same meaning as in the Stipulation of Settlement. Additionally, "FIFO basis" means Southeast Securities purchased during the Class Period shall be matched in chronological order with Southeast Securities sold during the Class Period or held at the end of the Class Period on a first in, first out, basis.

(ii.) The Net Settlement Funds shall be allocated among claimants in two separate funds. Seventy percent (70%) of the Net Settlement Funds, plus any interest earned or accrued thereon, shall be allocated to claimants who purchased publicly traded Southeast Banking Corp. Stock (common or preferred), during the Class Period (the "Stock Fund"). Thirty percent (30%) of the Net Settlement Funds shall be allocated to Claimants who purchased publicly traded Southeast Banking Corp. debt securities (notes, capital notes, convertible and non-convertible subordinated debentures) during the Class Period (the "Debt Fund").

(iii.) Claims shall be paid to Claimants from the Stock Fund and

the Debt Fund in accordance with the Recognized Loss of each Claimant. The Recognized Loss shall be defined as a fraction, the numerator of which shall be the losses actually sustained by the Claimant, and the denominator of which shall be total value of the claims submitted by Claimants in the respective Stock and Bond Funds. The losses shall be determined by subtracting from the amount paid (less commissions and fees) for the Claimants' Southeast Securities, any funds received upon sale of such securities (exclusive of commissions or fees). Southeast Securities not sold during the Class Period shall have a market loss in the amount equal to the amount paid for such Southeast Securities (less commissions and fees) minus the publicly quoted price, if any, of such Southeast Securities on the last day of the Class Period.

(iv.) All determinations of losses shall be determined on a "FIFO" basis.

(v.) Prior to payment to Claimants, Court approval shall be obtained authorizing the distribution of the Net Settlement Funds to

claimants in accordance with the foregoing Plan of Allocation.

(c) The Net Settlement Fund shall be distributed to Authorized Claimants in accordance with the terms of the Stipulation and the Final Order and Judgment to be entered therein.

Payment in the manner set forth above shall be deemed conclusive as to the claims of all Class members. All Class Members who do not submit timely and properly completed Proofs of Claim against Settlement Funds or whose Proofs of Claim are not approved shall be barred from participating in distributions from Settlement Funds, but otherwise shall be bound by the terms and conditions of the Stipulation, including the terms of the Release contained in the Stipulation, and the Final Order and Judgment to be entered in the Litigation, unless they have been properly excluded from the Class.

REQUEST FOR EXCLUSION

IF YOU PROPERLY REQUEST EXCLUSION FROM THE CLASS, YOU WILL NOT RECEIVE ANY PAYMENT PURSUANT TO THE SETTLEMENT.

If you wish to be excluded from the Class, you may ask the Court to exclude you by filing a Request for Exclusion. Your Request for Exclusion must be in writing and postmarked on or before October 18, 1993. You must include your name, address and telephone number, and the caption of the Litigation and state that you wish to be excluded from the

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Class. *You MUST also list purchases of Southeast Securities during the Class Period (by number of shares, type of shares and price paid per share); sales or dispositions of such securities during the Class Period, if applicable (by number of shares, type of shares, and price received from any such sale or disposition); the date of each such transaction; and the name of the person in whose name the securities were registered.* You should also provide documentation of your transaction in Southeast Securities with your request for exclusion. All Requests for Exclusion must be mailed to: Lewis F. Murhphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 S. Biscayne Boulevard, Miami, FL 33131-2398

If you properly and timely request exclusion from the Class, you will not be bound by any judgment entered in the Litigation, and you will be free to pursue whatever legal rights you may have against any of the Defendants at your own expense.

If you do not timely mail your election to be excluded from the Class and do not or cannot file a proper Proof of Claim that entitles you to receive Settlement proceeds, you will not share in the Settlement *but* you will be included automatically in the Class and bound by the Stipulation of Settlement and the Final Order and Judgment to be entered in this lawsuit pursuant thereto.

If you do not request exclusion from the Class you may, if you so choose, enter an appearance through legal counsel of your choice at your own expense and have all the rights and obligations set forth in Rule 23 of the Federal Rules of Civil Procedure. If this is your choice, you must notify the Clerk of

the Court, United States District Court for the Southern District of Florida, United States District Courthouse, 301 North Maimi Avenue, Miami, Florida 33128, that you wish to be represented by your personal attorney and send a copy of such notice to Michael J. Pucillo, Esquire at the address set forth below, and to Lewis F. Murphy, P.A., at the address set forth above. Any such request must be in writing and must be postmarked on or before November 1, 1993.

If you do not have your attorney appear for you, your interests will be represented by one or more of the following Lead counsel for the Class:

Michael J. Pucillo, Esquire
Chimicles, Burt & Jacobsen
222 Lakeview Avenue
Suite 960
West Palm Beach, FL 33401

Joseph H. Weiss, Esquire
319 Fifth Avenue
New York, NY 10016

Jules Brody, Esquire
6 East 45th Street
New York, NY 10017

SETTLEMENT HEARING

The Settlement Hearing will be held on November 15, 1993, at 8:30 a.m. in the Courtroom of Judge Kevin Michael Moore in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128. The Settlement Hearing may be adjourned from time to time by the Court without further notice. Notice of any such adjournment may only be provided at the Settlement Hearing.

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At the Settlement Hearing, the Court will consider whether it should finally approve this Settlement and dismiss the Litigation on the merits and with prejudice. At the Settlement Hearing, any Class Member who has not previously filed a Request for Exclusion from the Class in the manner set fourth above may appear in person or by counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the Settlement or any of the other matters to be considered by the Court, *provided,* however, that in no event shall a person be heard in opposition to the proposed Settlement, Plaintiffs' applications for counsel fees, reimbursement of expenses and/or individual awards to named Plaintiffs unless, on or before November 1, 1993 such person (*a*) files with the Clerk of the Court notice of such person's intention to appear, together with a statement that indicates the basis for such opposition which includes the information described in the second paragraph under the heading REQUEST FOR EXCLUSION hereof, along with any supporting documentation and; (*b*) serves copies of such notice, statement and documentation, together with copies of any other papers or briefs such person files with the Court, in person or by mail uopn each of the following attorneys:

Michael J. Pucillo, Esquire
Chimicles, Burt & Jacobsen
222 Lakeview Avenue
Suite 960
West Palm Beach, FL 33401
for Plaintiffs' Lead Counsel

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131-2398
for Defendants' Representative Counsel

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ATTORNEYS' FEES, DISBURSEMENTS, AND INDIVIDUAL PAYMENTS TO NAMED PLAINTIFFS

At the Settlement Hearing or at such later time as the Court may direct, Plaintiffs' Lead Counsel will apply to the Court for an award from the Settlement Funds of attorneys' fees, which will not be in an amount greater than 25% of the Settlement Funds, and for reimbursements of out-of-pocket expenses, together with interest earned upon such amounts. Plaintiffs' Lead Counsel will also seek payment from the Settlement Funds of an amount, that will not exceed $2,000, to each of the named Plaintiffs over and above their proportionate share of the Settlement Funds.

EXAMINATION OF PAPERS AND INQUIRIES

For a more detailed statement of the matters involved in the Litigation, reference is made to the pleadings, to the Stipulation of Settlement, to the orders entered by the Court and to the other papers filed in the Litigation, which may be inspected at the Office of the Clerk of the United States Distrcit Court for the Southern District of Florida, 301 N. Miami Avenue, Miami, FL 33128, during business hours of each business day.

Any inquiries concerning this Notice or the Proof of Claim form by Class Members should be made to Plaintiffs' Lead Counsel *in writing*. No telephone inquiries should be made. Inquiries should *not* be directed to the Court or the Clerk's office.

Distribution of the proceeds of the Settlement is subject to Court approval.

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SPECIAL NOTICE TO SECURITIES BROKERS AND OTHER NOMINEES

If you purchased or acquired Southeast securities during the Class Period for the beneficial interest of a person or organization other than yourself, you are required to provide to the Settlement Administrator the name and last known address of each person or organization for whom or which you purchased or acquired Southeast Banking Corp. publicly traded securities, including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures, and/or securitized asset interests during such time period. Such information should be sent to:

Southeast Banking Corp. Securities
Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

within seven (7) days of your receipt of this notice. The Settlement Administrator will forward copies of this Notice and a Proof of Claim form to each beneficial owner so designated by you in writing.

Alternatively, you may request additional copies of this Notice and Proof of Claim forms for each Class Member for whom you acted and whom you identify, which will be provided to you at the expense of the Class, and you may mail the Notice and Proof of Claim forms directly to the beneficial owners of the Southeast Securities referred to herein. You may be entitled to reimbursement of your reasonable out-of-pocket expenses actually incurred in connection with the foregoing,

provided that the Settlement Administrator will reimburse you at the prevailing domestic postage rate for each Notice and Proof of Claim form mailed to members of the Class at the lowest rate at which they could properly be mailed. No payment will be permitted for service charges, handling fees, excess postage or similar charges. Payment will be made for these charges as submitted by affidavit or declaration under penalty of perjury to the Settlement Administrator and only after review and approval by the Settlement Administrator.

SPECIAL NOTICE TO RELEASED PARTIES

Regardless of whether you purchased Southeast Securities during the Class Period, if you are a former officer or director of Southeast or if you are a spouse, heir, executor, administrator, successor or assign of a former officer or director of Southeast, including any Defendant in this Litigation, you are *NOT* a Class Member and may not participate in this Settlement as a Class Member. Other "Released Parties" — such as employees, accountants, attorneys and advisors of Southeast — who purchased Southeast Securities during the Class Period *ARE* Class Members and may participate in this Settlement as a Class Member. However, you cannot benefit financially from the Settlement Funds and also benefit from the release to Released Parties. Therefore, Class members who file a Proof a Claim and seek to benefit from the Settlement Funds will automatically lose their status as a "Released Party" and will in no way benefit from the release from potential liability conferred upon other Released Parties.

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Dated: September 15, 1993

CLERK, UNITED STATES DISTRICT COURT
T. G. CHELIOTIS

INSTRUCTIONS FOR COMPLETING SUBSTITUTE FORM W-9

(Section references are to the Internal Revenue Code.)

Purpose of Form. — A person who is required to file an information return with IRS must obtain your correct taxpayer identification number (TIN) to report income paid to you, real estate transactions, mortgage interest you paid, the acquisition or abandonment of secured property, or contributions you made to an individual retirement arrangement (IRA). Use Form W-9 to furnish your correct TIN to the requester (the person asking you to furnish your TIN), and, when applicable, (1) to certify that the TIN you are furnishing is correct, (2) to certify that you are not subject to backup withholding, and (3) to claim exemption fro backup withholding if you are an exempt payee. Furnishing your correct TIN and making the appropriate certifications will prevent certain payments from being subject to the 31% backup withholding.

Note: *If a requester gives you a form other than a W-9 to request your TIN, you must use the requester's form.*

How To Obtain a TIN. — If you do not have a TIN, you should apply for one immediately. To apply for the number, obtain Form SS-5, Application for a Social Security Number Card (for individuals), or Form SS-4, Application for Employer Identification Number (for businesses and all other

entities), at your local office of the Social Security Administration or the Internal Revenue Service. Complete and file the appropriate form according to its instructions.

To complete Form W-9 if you do not have a TIN, write "Applied For" in the space for the TIN in Part 1, sign and date the form, and give it to the requester. For payments that could be subject to backup withholding, you will then have 60 days to obtain a TIN and furnish it to the requester.

During the 60-day period, the payments you receive will not be subject to the 31% backup withholding, unless you make a withdrawal. However, if the requester does not receive your TIN form you within 60 days, backup withholding, if applicable, will begin and continue until you furnish your TIN to the requester.

Note: *Writing "Applied For" on the form means that you have already applied for a TIN OR that you intend to apply for one in the near future.*

As soon as you receive your TIN, complete another Form W-9, include your new TIN, sign and date the form, and give it to the requester.

What is Backup Withholding? — Persons making certain payments to you are required to withhold and pay to IRS 31% of such payments under certain conditions. This is called "backup withholding." Payments that could be subject to backup withholding include interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee compensation, and certain payments from fishing boat operators, but do not include real estate transactions.

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If you give the requester your correct TIN, make the appropriate certifications, and report all your taxable interest and dividends on your tax return, your payments will not be subject to backup withholding. Payments you receive will be subject to backup withholding if:

(1) You do not furnish your TIN to the requester, or

(2) IRS notifies the requester that you furnished an incorrect TIN, or

(3) You are notified by IRS that you are subject to backup withholding because you failed to report all your interest and dividends on your tax return (for interest and dividend accounts only), or

(4) You fail to certify to the requester that you are not subject to backup withholding under (3) above (for interest and dividend accounts opened after 1983 only), or

(5) You fail to certify your TIN. This applies only to interest, dividend, broker, or barter exchange accounts opened after 1983, or broker accounts considered inactive in 1983.

For other payments, you are subject to backup withholding only if (1) or (2) above applies.

Certain payees and payments are exempt from backup withholding and information reporting. *See Payees and Payments Exempt From Backup Withholding*, below, and *Exempt Payees and Payments* under *Specific Instructions*, on page 2, if you are an exempt payee.

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Payees and Payments Exempt From Backup Withholding. — The following lists payees that are exempt from backup withholding and information reporting. For interest and dividends, all listed payees are exempt except item (9). For broker transactions, payees listed in (1) through (13), and a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker are exempt. Payments subject to reporting under sections 6041 and 6041A are generally exempt from backup withholding only if made to payees described in items (1) through (7), except that a corporation that provides medical and health care services or bills and collects payments for such services is not exempt from backup withholding or information reporting. Only payees described in items (2) through (6) are exempt from backup withholding for barter exchange transactions, patronage dividends, and payments by certain fishing boat operators.

(1) A corporation.

(2) An organization exempt from tax under section 501(a), or an individual retirement plan (IRA), or a custodial account under 403(b)(7).

(3) The United States or any agency or instrumentality thereof.

(4) A state, the District of Columbia, a possession of the United States, or any political subdivision or instrumentality thereof.

(5) A foreign government or a political subdivision, agency or instrumentality thereof.

(6) An international organization or any agency or instrumentality thereof.

(7) A foreign central bank of issue.

(8) A dealer in securities or commodities required to register in the U.S. or a possession of the U.S.

(9) A futures commission merchant registered with the Commodity Futures Trading Commission.

(10) A real estate investment trust.

(11) An entity registered at all times during the tax year under the Investment Company Act of 1940.

(12) A common trust fund operated by a bank under section 584(a).

(13) A financial institution.

(14) A middleman known in the investment community as a nominee or listed in the most recent publication of the American Society of Corporate Secretaries, Inc., Nominee List.

(15) A trust exempt from tax under section 664 or described in section 4947.

Payments of dividends and patronage dividends generally not subject to backup withholding also include the following:

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- Payments to nonresident aliens subject to withholding under section 1441.

- Payments to partnerships not engaged in a trade or business in the U.S. and that have at least one nonresident partner.

- Payments of patronage dividends not paid in money.

- Payments made by certain foreign organizations.

Payments of **interest** generally not subject to backup withholding include the following:

- Payments of interest on obligations issued by individuals. **Note:** *You may be subject to backup withholding if this interest is $600 or more and is paid in the course of the payer's trade or business and you have not provided your correct TIN to the payer.*

- Payments of tax-exempt interest (including exempt-interest dividends under section 852).

- Payments described in section 6049(b)(5) to nonresident aliens.

- Payments on tax-free covenant bonds under section 1451.

- Payments made by certain foreign organizations.

- Mortgage interest paid by you.

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Payments that are not subject to information reporting are also not subject to backup withholding. For details, see sections 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, and 6050N, and the regulations under such sections.

Penalties

Failure To Furnish TIN. — If you fail to furnish your correct TIN to a requester, you are subject to a penalty of $50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

Failure to Include Certain Items on Your Tax Return. — If you fail to properly include on your tax return certain items reported to IRS, such failure will be treated as being due to negligence, and you will be subject to a penalty of 5% on any part of an underpayment of tax attributable to that failure unless there is clear and convincing evidence to the contrary.

Civil Penalty for False Information With Respect to Withholding. — If you make a false statement with no reasonable basis that results in no imposition of backup withholding, you are subject to a penalty of $500.

Criminal Penalty for Falsifying Information. — Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment.

Specific Instructions

Name. — If you are an individual, generally provide the name shown on your social security card. However, if you have changed your last name, for instance, due to marriage, without

informing the Social Security Administration of the name change, you may enter your first name and both the last name shown on your social security card and your new last name.

Signing the Certification. —

(1) Interest, Dividend, and Barter Exchange Accounts Opened Before 1984 and Broker Accounts That Were Considered Active During 1983. — You are not required to sign the certification; however, you may do so. You are required to provide your correct TIN.

(2) Interest, Dividend, Broker and Barter Exchange Accounts Opened After 1983 and Broker Accounts That Were Considered Inactive During 1983. — You must sign the certification or backup withholding will apply. If you are subject to backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item (2) in the certification before signing the form.

(3) Real Estate Transactions. — You must sign the certification. You may cross out item (2) of the certification if you wish.

(4) Other Payments. — You are required to furnish your correct TIN, but you are not required to sign the certification unless you have been notified of an incorrect TIN. Other payments include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services, payments to a nonemployee for services (including attorney and accounting fees), and payments to certain fishing boat crew members.

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(5) Mortgage Interest Paid by You, Acquisition or Abandonment of Secured Property, or IRA Contributions. — You are required to furnish your correct TIN, but you are not required to sign the certification.

(6) Exempt Payees and Payments. — If you are exempt from backup withholding, you should complete this form to avoid possible erroneous backup withholding. Enter your correct TIN in Part I, write "EXEMPT" in the block in Part II, cross out item (2) of the certification, sign and date the form. If you are a nonresident alien or foreign entity not subject to backup withholding, give the requester a completed Form W-8, Certificate of Foreign Status.

(7) TIN "Applied For." — Follow the instructions under *How To Obtain a TIN*, earlier, sign and date this form.

Signature. — For a joint account, only the person whose TIN is shown in Part I should sign the form.

Privacy Act Notice. — Section 6109 requires you to furnish your correct taxpayer identification number (TIN) to persons who must file information returns with IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, or contributions you made to an individual retirement arrangement (IRA). IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 31% of taxable interest, dividend, and certain other payments to a payee who does not furnish a TIN to a payer. Certain penalties may also apply.

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What Name and Number to Give the Requester

For this type of account:	Give the name and SOCIAL SECURITY number of:
1. Individual	The individual
2. Two or more individuals (joint account)	The actual owner of the account or, if combined funds, the first individual on the account[1]
3. Custodian account of a minor (Uniform Gift to Minors Act)	The minor[2]
4. a. The usual revocable savings trust (grantor is also trustee)	The grantor-trustee[1]
b. So-called trust account that is not a legal or valid trust under state law	The actual owner[1]
5. Sole proprietorship	The owner[3]

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For this type of account:	Give the name and EMPLOYER IDENTIFICATION number of:
6. A valid trust, estate, or pension trust	Legal entity (Do not furnish the identification number of the personal representative or trustee unless the legal entity itself is not designated in the account title.)[4]
7. Corporate	The corporation
8. Association, club, religious, charitable, educational, or other tax-exempt organization	The organization
9. Partnership	The Partnership
10. A broker or registered nominee	The broker or nominee
11. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program payments	The public entity

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[1] **List first and circle the name of the person whose number you furnish.**

[2] **Circle the minor's name and furnish the minor's social security number.**

[3] **Show the name of the owner.**

[4] **List first and circle the name of the legal trust, estate, or pension trust.**

Note: ***If no name is circled when there is more than one name, the number will bne considered to be that of the first name listed.***

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

PROOF OF CLAIM AND RELEASE

NOTE: YOU SHOULD NOT COMPLETE THIS FORM UNLESS YOU PURCHASED SOUTHEAST BANKING CORP. PUBLICLY TRADED COMMON STOCK, PREFERRED STOCK, CAPITAL NOTES, NOTES, CONVERTIBLE SUBORDINATED DEBENTURES, NON-CONVERTIBLE DEBENTURES, SECURITIZED ASSET INTERESTS AND/OR OTHER PUBLICLY TRADED SECURITIES OF SOUTHEAST BANKING CORP. DURING THE PERIOD FROM FEBRUARY 27, 1989 THROUGH SEPTEMBER 20, 1991. IF YOU DID SO, YOU ARE A "CLASS MEMBER" ENTITLED TO PARTICIPATE IN THE SETTLEMENT OF THE LITIGATION, AND YOU MAY BE ENTITLED TO SETTLEMENT PROCEEDS. (Excluded from the Class are the Defendants, former officers and directors of Southeast Banking Corp., and their spouses, heirs, executors, administrators, successors and assigns, and those persons who have excluded themselves pursuant to the provisions of the Notice.)

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IN ORDER TO RECEIVE ANY PAYMENTS TO WHICH YOU MAY BE ENTITLED AS A CLASS MEMBER, YOU MUST COMPLETE AND SIGN THIS PROOF OF CLAIM, AND MAIL IT BY PRE-PAID, FIRST CLASS MAIL, POSTMARKED NO LATER THAN DECEMBER 27,1993 TO THE FOLLOWING ADDRESS:

Southeast Banking Corp. Securities Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

YOUR FAILURE TO SUBMIT YOUR CLAIM BY DECEMBER 27, 1993 WILL SUBJECT YOUR CLAIM TO REJECTION AND PRECLUDE YOU FROM RECEIVING ANY MONEY IN CONNECTION WITH THE SETTLEMENT OF THIS LITIGATION. DO NOT MAIL OR DELIVER YOUR CLAIM TO THE COURT OR TO ANY OF THE PARTIES OR THEIR COUNSEL, AS ANY SUCH CLAIM WILL BE DEEMED NOT TO HAVE BEEN SUBMITTED.

THIS WILL BE YOUR ONLY OPPORTUNITY TO SHARE IN THE BENEFITS OF THE SETTLEMENT OF THIS ACTION. HOWEVER, EVEN IF YOU DO NOT SUBMIT THIS PROOF OF CLAIM, YOU WILL BE BOUND BY THE COURT'S FINAL ORDER AND JUDGMENT IN THIS MATTER AND WILL BE FOREVER BARRED FROM PURSUING ANY ACTION AGAINST ANY OF THE DEFENDANTS IN THIS ACTION, OR ANY RELEASED PARTY, RELATING TO ANY RELEASED CLAIM UNLESS YOU HAVE BEEN PROPERLY EXCLUDED FROM THE CLASS.

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I. I did __, I did not __ (check one) purchase any publicly traded securities of Southeast Banking Corp. ("Southeast") during the period from February 27, 1989 through and including September 20, 1991.

II. By submitting this Proof of Claim, I state that I believe in good faith that I am a Class Member as defined in the Notice of Pendency of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear ("Notice"), or am acting for such person; that I have read and understood the contents of the Notice; that I am not, and am not acting for any of the Defendants herein or the former officers or directors of Southeast Banking Corp. or their spouses, heirs, executors, administrators, successors or assigns; that I have not filed a Request for Exclusion, seeking to be excluded from the Class; that I believe that I am entitled to receive a share of the Net Settlement Fund; and that I elect to participate In the proposed Settlement described in the Notice.

III. I have set forth where requested all relevant information with respect to each purchase, of Southeast's publicly traded securities during the Class Period; and each sale, if any, of such securities.

IV. I have enclosed photocoples or facsimiles of the stockbrokers confirmation slips or other documents evidencing each acquisition and sale 1isted below in support of my claimed loss. (*NOTE:* IF ANY SUCH DOCUMENTS ARE NOT IN YOUR POSSESSION, PLEASE OBTAIN A COPY, FACSIMILE OR EQUIVALENT DOCUMENTS FROM YOUR BROKER BECAUSE THESE DOCUMENTS ARE NECESSARY TO PROVE AND PROCESS YOUR CLAIM.)

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V. I agree and understand that if the proposed Settlement is approved by the Court and becomes effective, all claims, demands, or causes of action against any or all Defendants and certain other persons which have been or could have been asserted relating to the subject matter of the litigation will be satisfied, discharged and extinguished forever in accordance with the Release provided on behalf of Class Members in the Stipulation of Settlement and by the terms of the Final Order and Judgment.

VI. My signature hereto constitutes a full and complete release, remise and discharge by me or, if I am submitting this Proof of Claim on behalf of a corporation, partnership, estate or one or more persons, by it, him, her or them, and by my, its, his, her or their heirs, executors, administrators, successors, affiliates and assigns, of all Defendnats, former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, consultants, investors, affiliates, independent contractors and associates of Southeast Banking Corp. and its subsidiaries, affiliates, divisions and predecessors or successor corporations, and their respective spouses, heirs, executors, administrators, successors, affiliates and assigns, and each of them (the "Released Parties as defined in paragraph A.1.x of the Stipulation of Settlement), from all Released Claims as defined in paragraph A.1.w of the Stipulation of Settlement. The Released Claims are: (1) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reason of any matter, cause or thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of

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Southeast Securities, by a Class Member; and (ii) any and all claims, actions, causes of action, rights or liabilties, including Unknown Claims, which a Class Member had, has, or may in the future have that are or could have been alleged in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast. This release, however, is conditioned upon the Court's approval of the Settlement and upon the Settlement becoming effective.

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VII. STATEMENT OF CLAIM

Name(s) of
Beneficial Owner(s) _____

Street No.
and Street: _____

City: _____ State:__ Zip Code:___-___

Country: _____ Telephone Number:___-___

Taxpayer I.D.No.: -__ OR Social Security Number:__-__-__

_Individual _Corporation _Estate _Other (specify) _____

Area Telephone No. (work) Area Telephone No. (home)

_____

Record Owner's Name (if different from Beneficial Owner listed above)

A. Claimant(s) made the follwing purchases of Southeast's publicly traded securities during the Class Period. *All references to purchase dates relate to trade dates, not settlement dates.* (If you have acquired any Southeast common stock that had been *purchased during the Class Period* by gift, inheritance, or operation law, you are to report this transaction as if you acquired the stock at the same time asnd at the same cost as the person who purchased such security):

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Type of Security	Date(s) of Purchase (List Chrono-logically) Month/Day/ Year - -	Number of Shares/ Debentures	Purchase Price Per Share/ Debenture (excluding commission, taxes and fees) $.	Aggregate Cost excluding commission, taxes and fees) $.

* * *

(indicate with an asterisk (*) any transaction held in the name of the record owners(s) listed above.)

B. Of the shares listed in Section VII.A above, Claimant(s) sold the follwing Southeast publicly traded securities during the Class Period. *(All references to sale dates relate to trade dates, not settlement dates):*

Type of Security	Date(s) of Sale (List Chrono-logically) Month/Day/ Year - -	Number of Shares/ Debentures Sold	Selling Price Per Share/ Debenture (excluding commission, taxes and fees) $.	Amount Realized (aggregate proceeds excluding commission, taxes and fees) $.

* * *

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VIII. SUBSTITUTE FORM W-9

Request for Taxpayer Identification Number. Enter taxpayer identification number below for the Beneficial Owner(s). For most individuals, this your Social Security number. The Internal Revenue Service requires such taxpayer identification number. If you fail to furnish the correct taxpayer identification, 31% of the interest portion of your distributive share of the Settlement Funds will be withheld and/or your claim will be rejected.

Social Security Number: - -
(for individuals)
or
Employer Identification Number: —
(for estates, trusts, corporations, etc.)

NOTE: A copy of the I.R.S. Guidelines for certification of Taxpayer Identification Number on Substitute Form W-9 and a description of payees subject to or exempt from the backup withholding requirements are included as part of the Notice accompanying this Proof of Claim form.

IX. CERTIFICATION

UNDER THE PENALTIES OF PERJURY, I (WE) CERTIFY THAT ALL OF THE INFORMATION PROVIDED ON THIS FORM IS TRUE, CORRECT AND COMPLETE.

I (We) certify that I am (we are) NOT subject to backup withholding, under the provisions of Section 3406(a)(1)(c) of the Internal Revenue Code.

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NOTE: If you have been notified by the Internal Revenue Service that you are subject to backup withholding, please strike out the language that you are not subject to backup withholding in the certification above.

Signature of Claimant
(If this claim is being made on behalf of Joint Claimants, each must sign)

Date: (Signature)

(Print Name)

Date: (Signature)

(Print Name)

THIS PROOF OF CLAIM MUST BE RECEIVED BY THE SETTLEMENT ADMINISTRATOR OR POSTMARKED NO LATER THAN DECEMBER 27, 1993, AND MUST BE MAILED TO:

Southeast Banking Corp. Securities Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

NOTE: If you wish to be assured that your Proof of Claim is actually received by the Settlement Administrator, you should send it by Certified Mail. Return Receipt Requested. Certified Mail may, however require more time for delivery than first class mail. No acknowledgement will be made as to the receipt

of claim forms. You should be aware that it will take a significant amount of time to process fully all of the Proofs of Claim and to administer the settlement. This work will be completed as promptly as time permits, given the need to fully investigate and tabulate each Proof of Claim. In the interim, the Settlement Fund is earning interest in which you will share, *pro rata*.